(14)

No. 96-1769-CFX
Status: GRANTED

Title: Ohio Adult Parole Authority, et al., Petitioners
v.
Eugene Woodard

Docketed:
May 6, 1997

Court: United States Court of Appeals for
the Sixth Circuit

Counsel for petitioner: Sutton,Jeffrey Stuart

Counsel for respondent: Benza,Michael J., Bodiker,David H.

Entry	Date	Note	Proceedings and Orders
1	May 6 1997	G	Petition for writ of certiorari filed. (Response due June 5, 1997)
2	Jun 3 1997		Brief of respondent Eugene Woodward in opposition filed.
3	Jun 3 1997	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Jun 5 1997		Brief amici curiae of California, et al. filed.
5	Jun 9 1997		Reply brief of petitioners Ohio Adult Parole Authority, et al. filed.
6	Jun 10 1997		DISTRIBUTED. June 26, 1997 (Page 5)
8	Jun 27 1997		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Jun 27 1997		Petition GRANTED. SET FOR ARGUMENT December 10, 1997. **********
10	Jul 21 1997	G	Motion of respondent for appointment of counsel filed.
11	Jul 23 1997		DISTRIBUTED. September 29, 1997 (Page 57)
13	Aug 5 1997		Order extending time to file brief of petitioner on the merits until August 21, 1997.
14	Aug 21 1997		Joint appendix filed.
15	Aug 21 1997		Brief of petitioners Ohio Adult Parole Authority, et al. filed.
16	Aug 21 1997		Brief amici curiae of California, et al. filed.
17	Aug 21 1997		Brief amicus curiae of Criminal Justice Legal Foundation filed.
19	Sep 17 1997		Order extending time to file brief of respondent on the merits until October 10, 1997.
20	Oct 6 1997		Motion for appointment of counsel GRANTED and it is ordered that Michael J. Benza, Esquire, of Columbus, Ohio, is appointed to serve as counsel for the respondent in this case.
21	Oct 9 1997	G	Motion of respondent to substitute David H. Bodiker as appointed counsel filed.
23	Oct 9 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
22	Oct 10 1997		Brief amicus curiae of American Bar Association filed.
25	Oct 10 1997		Brief of respondent Eugne Woodward filed.
26	Oct 10 1997		Brief of American Civil Liberties Union and ACLU of Ohio filed.
24	Oct 14 1997		DISTRIBUTED. October 17, 1997 (Page 15)
27	Oct 20 1997		Motion of respondent to substitute David H. Bodiker as appointed counsel GRANTED.
28	Oct 20 1997		LODGING by respondent of Archival Documents.

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No. 96-1769-CFX

Entry	Date	Note	Proceedings and Orders
29	Oct 31 1997		CIRCULATED.
30	Nov 10 1997		Record filed.
		*	Partial record proceedings, U.S. Court of Appeals for the Sixth Circuit.
31	Nov 10 1997	X	Reply brief of petitioners Ohio Adult Parole Authority, et al. filed.
32	Nov 13 1997		Record filed.
		*	Record proceedings District Court for the Southern District of Ohio.
33	Dec 10 1997		ARGUED.

Supreme Court, U.S.
FILED

961769 MAY 6 1997

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Attorney General

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

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SUPREME COURT, U.S.

CAPITAL CASE
VALIDITY OF CLEMENCY PROCEDURES

QUESTIONS PRESENTED

I.

WHETHER STATE CLEMENCY PROCEDURES MAY BE REVIEWED UNDER THE DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT ESTABLISHED BY *EVITTS V. LUCEY*, 469 U.S. 387 (1985), OR WHETHER *CONNECTICUT BOARD OF PARDONS V. DUMSCHAT*, 452 U.S. 458 (1981) CONTAINS THE SOLE DUE PROCESS LIMITATIONS ON THOSE PROCEDURES.

II.

WHETHER INMATE INTERVIEWS, HELD VOLUNTARILY AT THE REQUEST OF THE INMATE AS PART OF A STATE CLEMENCY PROCEDURE, IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

LIST OF PARTIES

Petitioners are the Ohio Adult Parole Authority; Jill Goldhart, Chief of the Adult Parole Authority; Margrette Ghee, Chairwoman of the Ohio Adult Parole Board; Walter Escols; Raymond E. Capots; William E. Hudson; Robert E. Smith; Richard Gooch; Gloria Andrews; Jay R. Denton; and Constance M. Upper.

Respondent is Eugene Woodard.

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OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on March 3, 1997, is reported. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997). (A-1). The order of the United States District Court for the Southern District of Ohio, Eastern Division, granting petitioners' motion for judgment on the pleadings on September 8, 1995, is unreported. *Eugene Woodard v. Ohio Adult Parole Authority*, Case No. C2-94-892. (A-41). The magistrate judge's report and recommendation, granting petitioners' motion for judgment on the pleadings on June 20, 1995, is unreported. *Eugene Woodard v. Ohio Adult Parole Authority*, Case No. C2-94-892. (A-43).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on March 3, 1997. (A-1). Jurisdiction exists under 28 U.S.C. section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Ohio's Death Penalty Clemency Procedure:

I. *AUTHORITY*

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. *PURPOSE*

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. *APPLICABILITY*

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing them.

IV. *DEFINITIONS*

None.

V. *POLICY*

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

VI. *PROCEDURE*

A. Notification to all condemned inmates of this policy.
   1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death

shall be given a copy of this policy.

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.
2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.
3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximately twenty-one days prior to the scheduled execution date. The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.
4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this

notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a psychological or psychiatric evaluation as determined appropriate by the Parole Board.
2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by this parole board

chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.
2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.
3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.
2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.
   Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.
3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the

prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of the condemned prisoner, the Parole Board

may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

I. Ohio's Modification To Its Clemency Procedure.

In 1994, a death row inmate failed to receive a stay of execution until just days before his scheduled execution date. Because the inmate was a first federal habeas petitioner and because the existing clemency procedure did not provide a mechanism for providing clemency review before that time, the Ohio Governor faced the prospect of receiving an emergency clemency request from an inmate about whom he had little information. The eleventh-hour nature of the proceedings prompted the Governor to modify the executive clemency review process. Among other things, he made changes to the procedure ensuring that neither he nor his successor would ever again receive a sudden request for clemency from an inmate about whom the Governor knew so little. The impetus for this change of course had little to do with the baseline requirements of the federal Constitution; it was the Governor's desire to exercise his clemency powers in a responsible and deliberate manner.

The 1994 amendments to the clemency process

establish a standard procedure for handling clemency applications in death penalty cases. The process starts after the inmate completes his or her direct review and the Ohio Supreme Court sets an execution date. At that point, the clemency review board begins collecting information about the prisoner's offense, prior record and background. In the event the inmate fails to obtain a stay 45 days prior to the scheduled execution date, the board schedules a clemency review hearing that must be completed 21 days prior to the date of execution. The parole board then notifies the inmate and counsel about the hearing. Once such a hearing has been scheduled -- whenever, that is, the inmate fails to obtain a stay more than 45 days before the execution date -- Ohio requires the clemency review to be completed and a recommendation to be made even though a court later stays the execution.

The notice of this procedure explains to the inmates that they may obtain a clemency interview if they request it in writing. *See* IV (C)(2). If a request is made, one or more parole board members then interviews the inmate before the board conducts a hearing on the application, at which time the board considers all available relevant information. After the hearing the board makes a clemency recommendation and communicates it to the Governor's office. Should new information become available after the parole board's initial recommendation, the board may supply it to the Governor, the board may in its discretion hold another hearing, and the board may alter its initial recommendation. In either event, the Governor retains unfettered discretion in ultimately making the decision whether to grant clemency. Ohio Const., Art. III, § 11.

II. The Underlying Proceedings.

Ohio's new clemency procedure became relevant to

respondent, Eugene Woodard, because of a series of crimes he committed on the evening of June 20, 1990. That night he and three other men intentionally drove a stolen car into another vehicle for the purposes of robbing its occupant. After the collision, Mr. Woodard approached the car and (as identified by an eyewitness at trial) shot the occupant, Mani Akram, a 19 year old college student, in the chest with a handgun. Mr. Akram was dumped from the car and left for dead (he later died from the wound), after which Mr. Woodard and his cohorts stole, stripped and torched the vehicle. In later arguing among themselves over who should get the loot, Mr. Woodard claimed "I should get the radio. I'm the one that shot the guy."

On the basis of this and other evidence, an Ohio jury found Mr. Woodard guilty of several crimes, including aggravated murder committed during the commission of a felony. The jury recommended the death penalty, and the trial court accepted its recommendation. The state court of appeals and the Ohio Supreme Court affirmed this decision, and this Court denied certiorari. *See State v. Woodard*, 1992 WL 84888 (Ohio App. 8th Dist. Apr. 23, 1992); *State v. Woodard*, 68 Ohio St.3d 70 (1993); *Woodard v. Ohio*, 512 U.S. 1246 (1994). On July 18, 1994, after the completion of direct review and in accordance with its normal procedures, the Ohio Supreme Court set Mr. Woodard's execution date for October 7, 1994. Mr. Woodard failed to obtain a stay of execution more than 45 days before his execution date. Accordingly, on September 6, 1994, the parole board notified counsel for Woodard about the clemency process and informed him that he could obtain a clemency interview (if he so desired) on September 9, 1994. The board also notified Mr. Woodard that his clemency hearing would be scheduled for September 16, 1994, twenty one days before his scheduled execution date.

On September 14, 1994, Mr. Woodard filed this complaint. He alleged that the new clemency procedure denied him due process, equal protection, as well as the right to remain silent, to be represented by counsel, and to be free of cruel and unusual punishment. On September 16, 1994, the parties entered into a consent decree whereby the clemency review was postponed and would not be rescheduled during the pendency of this suit without 30 days notice to the district court and counsel. Woodard was never interviewed. On June 20, 1995, the magistrate judge issued a report and recommendation granting the State judgment on the pleadings. (A-43). After entertaining respondent's objections to the report, the district court adopted the report and recommendation and granted the State's motion for judgment on the pleadings. (A-41).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. On March 3, 1997, the Sixth Circuit (Merritt, Nelson (dissent), *Moore*) reversed. (A-1). The court first agreed with the State that Woodard could not establish a protected life or liberty interest in the clemency procedure itself, relying on *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). (A-4). But the court then held that clemency played a part in Ohio's overall scheme of prosecution and punishment, and concluded that the clemency procedure therefore had to be reviewed under a separate "strand" of due process recognized in *Evitts v. Lucey*, 469 U.S. 387 (1985) (holding that due process guarantees a criminal defendant the right of effective counsel on his first appeal as of right). (A-12). Next, the court found that the voluntary uncounseled clemency interview established an unconstitutional condition, violating Mr. Woodard's Fifth Amendment privilege against self-incrimination. The court denied all other claims properly before it. In light of its decision, the court remanded the case to the district court to conduct a due process review of Ohio's clemency procedure

and to determine if an unconstitutional condition existed under the court of appeals' analysis.

Judge Merritt concurred in both prongs of the above analysis, while Judge Nelson dissented. Judge Nelson first found the dispute indistinguishable from *Dumschat* and accordingly could not understand how *Evitts* or and other precedent established additional limitations on Ohio's clemency procedure. Clemency decisions, he emphasized, were rarely, if ever, appropriate subjects for judicial review under *Dumschat*, a teaching he found hard to reconcile with the court's analysis. Judge Nelson next thought that the challenged regulation in no way required a waiver of the Fifth Amendment privilege against self-incrimination because the inmate who requests a clemency interview remains free to say as much or as little at the interview as he wishes.

REASONS FOR GRANTING THE WRIT

The decision below contains two exceedingly important interpretations of federal law, each inconsistent with decisions of this and other Courts and each with far-reaching consequences if left unreviewed. The first part of the decision threatens to undo decades of precedent concerning the wide discretion available to the States in establishing executive clemency procedures. Because each of the 38 States that has a death-penalty statute also has a clemency procedure and because the Sixth Circuit's interpretation of the due process requirements for clemency diverges from decisions of this Court and several lower-court decisions, the question warrants prompt review.

The second part of the decision is no less important. In holding that a clemency procedure affording inmates an optional voluntary interview places an unconstitutional condition on the inmate's Fifth Amendment rights, the lower

court has marked a new path in federal law, one rife with potential for misuse. The Sixth Circuit's reasoning effectively threatens all state and federal procedures that use this form of potential benefit -- sentencing procedures, allocution, parole and probation proceedings, and the right to testify at trial. Like the first issue, it should be promptly reviewed.

I. EXECUTIVE CLEMENCY DOES NOT COME WITHIN THE *EVITTS* DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT.

A. The Decision Below Directly Undermines One Precedent Of This Court And Improperly Expands Another.

In the decision below, the Sixth Circuit held that two "strands" of due process analysis govern a State's exercise of the power of executive clemency. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997). The first strand, the court held, places no limitation on Ohio's current clemency procedure in this instance. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). But the second strand, the court concluded, separately does limit that procedure on the view that Ohio's executive clemency represents a part of the scheme for adjudicating crimes and punishment limited by *Evitts v. Lucey*, 469 U.S. 387 (1985). That is mistaken. The lower court's attempt to respect *Evitts* improperly slights *Dumschat*.

In *Dumschat*, the inmate made a similar claim that due process limits a State's exercise of its clemency power. In particular, because the State routinely granted clemency to 75% of the individuals with life sentences, he claimed that

State had to provide reasons for denying him clemency. The Court disagreed. It held that where the decisionmaker has unfettered discretion in the exercise of a power, as in clemency, no due process liberty interest exists. A constitutional interest, the Court held, cannot be created out of a mere "unilateral hope." *Dumschat*, 452 U.S. at 465. For these reasons, *Dumschat* concluded that clemency has "not traditionally been the business of the courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Id.* at 464 (citing *Meachum v. Fano*, 427 U.S. 215 (225) (1976)) (footnote omitted). *See also Jago v. Van Curen*, 454 U.S. 14 (1981) (per curiam).

The source of the lower court's second strand of due process analysis, *Evitts v. Lucey*, did not involve executive clemency. It presented the question whether due process guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. Relying on *Douglas v. California*, 372 U.S. 353 (1963), which held that a criminal defendant has a right to counsel on direct appeal, *Evitts* concluded that the right to counsel necessarily includes the right to effective counsel. That conclusion, however, by no means warrants an extension of the requirements of due process in the area of executive clemency. Unlike a clemency proceeding, a first appeal of right plainly does play a part in the State's overall system for prosecuting and punishing those who disobey its laws. The discretionary nature of clemency has no counterpart in a first appeal of right or in any of the other components of the direct review of a criminal conviction. Perhaps most importantly, this extension of *Evitts* to the clemency setting necessarily contracts the discretion given to the States in this area under *Dumschat*. As the judgment in this case well illustrates, Ohio is entitled to judgment as a matter of law under *Dumschat* but must undergo further scrutiny in this case (and presumably all other death penalty cases until the issue is

resolved) under the *Evitts* rationale.

Dumschat, then, presented facts conspicuously similar to those here. And, if more than one strand of due process analysis potentially applies to a State's discretionary clemency procedure, that was no less true in *Dumschat* than it is today. Yet *Dumschat* held that clemency decisions are "rarely, if ever, appropriate subjects for judicial review." 452 U.S. at 464. Of course the Sixth Circuit may be right in concluding that a second strand of due process analysis applies to clemency decisions after *Evitts*. But right or wrong, such a new doctrine of federal clemency law ought to be reviewed promptly lest well-meaning clemency procedures bottleneck future enforcement of the death penalty statutes adopted by the citizens of 38 States or perhaps lead to the unintended consequence of diminishing the availability of a discretionary clemency procedure in the first instance. In the end, whether one calls the court's conclusion an expansion of a separate strand of due process analysis into the clemency arena (*Evitts*) or a contraction of the only previously-known strand for assessing due process limitations on clemency (*Dumschat*), the result is the same: The court has curbed the normal discretion the federal judiciary gives to the State executive branch's exercise of clemency. This sizeable expansion of federal review over such a critical State sovereign function, we respectfully submit, ought to be reviewed immediately.

B. The Decision Below Conflicts With Decisions From Several Other Circuits.

Not surprisingly, in view of the Sixth Circuit's departure from the *Dumschat* framework, the decision conflicts with several lower-court decisions as well. This, too, supports the petition.

Since *Dumschat*, the lower courts have faced similar challenges to State clemency procedures. Yet none of these challenges led to a decision holding that clemency constituted a part of the State's procedure for prosecution and punishment, requiring additional due process review and ultimately the federalization of the clemency process. On the contrary, they all directly conflict with the Sixth Circuit's analysis and follow the traditional teachings of *Dumschat*. *See Joubert v. Nebraska Board of Pardons*, 87 F.3d 966 (8th Cir. 1996) (holding that there is no constitutionally protected interest in how the Nebraska Board of Pardons reviews a clemency request or in having unbiased decisionmakers on the Board; right to clemency not violated when decisionmaker is predisposed); *Bundy v. Dugger*, 850 F.2d 1402, 1423-24 (5th Cir. 1988) (no protected due process interest where decision process is wholly a matter of executive discretion; clemency thus does not implicate the same punishment concerns as trial); *Huggins v. Isenbarger*, 798 F.2d 203, 205 (7th Cir. 1986) (liberty interest in clemency only exists when the decision depends solely on the "application of rules to facts. To the extent a request appeals to discretion rather than rules, there is no protected interest."); *Smith v. Snow*, 722 F.2d 630, 631-32 (11th Cir. 1983) ("Because the Georgia Parole Board's power to commute penalties is also completely discretionary, *Dumschat* is clearly controlling here and dictates the rejection of Smith's due process claim.") (citation omitted).

The above lower-court cases, together with the many others that follow *Dumschat*, diverge sharply from the Sixth Circuit's decision. To the State's knowledge, in fact, no lower court has rejected a clemency claim under *Dumschat*, then approved that same claim under an extension of *Evitts*. The conflict warrants resolution.

C. The Issue Presented Is National in Scope And Vital In Nature.

As an initial matter, the lower-court decision immediately affects Ohio, Kentucky, Tennessee and Michigan, the States covered by the Sixth Circuit. Their interest alone is not insignificant. Not one death penalty has been carried out by a Sixth Circuit State since each of them (except Michigan) reenacted their death penalty statutes in the aftermath of *Gregg v. Georgia*, 428 U.S. 153 (1976). Thus, in the years since then, not a single one of these statutes has been enforced. By making executive clemency part of the "overall scheme of prosecution and punishment" (A-12), the Sixth Circuit has provided a new vehicle for adding several more years to this conspicuous delay. Today, the courts must review Ohio's clemency procedure to determine if in addition to complying with *Dumschat* it also complies with *Evitts*. (A-12). Tomorrow, Kentucky and Tennessee can anticipate similar challenges. And, after that, presumably all death-row inmates in the three States will seek stays in order to join in these pending challenges. That is a recipe for several years of stay-induced delay.

Nor is this problem one confined to the States in the Sixth Circuit. In light of the Sixth Circuit's new analysis, it would border on malpractice not to challenge the executive clemency process under this additional strand of due process protection in the 35 other States having death-penalty statutes. As more and more inmates reach the end of the state appeal and federal habeas process, they will assuredly look to clemency challenges as another way to detour finality and advance delay.

Each of the above explanations for granting the writ assumes (perhaps unfairly) that the Sixth Circuit erred. But even if one is inclined that the Sixth Circuit accurately

interpreted *Evitts* and *Dumschat*, that is no reason for waiting longer to review the issue. On the contrary, initial agreement with the Sixth Circuit presents perhaps the strongest case for reviewing the issue immediately. To the State's knowledge, as noted, no other circuit in the country has mandated an independent *Evitts* due process review of a State's clemency procedure. Under these circumstances, it would seem, the States *and* the death-row inmates in the other circuits would desire immediate review of this important issue. All things considered, this component of the decision merits immediate review. It conflicts with decisions of this Court, it establishes doubt in the lower courts over the reviewability of State executive clemency decisions, and it represents a quintessentially important federal question.

II. THE DECISION BELOW INCORRECTLY ADOPTS, APPLIES AND EXPANDS THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN THE CONTEXT OF STATE EXECUTIVE CLEMENCY DECISIONS.

A. The Decision Below Conflicts With Decisions Of This Court.

The Sixth Circuit also held that a voluntary clemency interview presented the inmate with a "Hobson's choice" -- between participating in the interview procedure and asserting a Fifth Amendment privilege against self incrimination. The alleged choice, the court concluded, rose to the level of an unconstitutional condition.

The first reason for reviewing this portion of the decision is that it conflicts with precedent from this Court. More than two decades ago, in *Crampton v. Ohio*, 402 U.S. 183 (1971), the Court rejected a similar attempt to engraft

the doctrine of unconstitutional conditions onto a State criminal procedure. At issue in *Crampton* was Ohio's single-trial procedure, which then said that a defendant could exercise his right against self incrimination only on the condition that he also surrender his right to testify on the issue of punishment. In rejecting the challenge, the Court noted that the criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. *Id.* at 213. Thus, "although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved." *Id.* Measured against this modest standard, the Court found no such impairment through a state procedure forcing consistency, namely, a procedure requiring the defendant to choose between remaining silent on both issues or testifying on both issues. *Id.* at 217. The policies underlying the privilege against self-incrimination, the Court concluded, simply are not offended when a defendant yields to the pressure to testify on the issue of punishment. *Id.* at 217. Under these circumstances, it is difficult to see what remains of *Crampton* after the Sixth Circuit's decision. The only difference between the two cases is that *Crampton* involved a procedure -- the process of a criminal trial -- that vests far *less* discretion in the States than executive clemency does.

The Sixth Circuit also failed meaningfully to distinguish *Baxter v. Palmigiano*, 425 U.S. 308 (1975), which also rejected an attempt to apply the doctrine of unconstitutional conditions to a criminal procedure. In *Baxter*, the defendant challenged a State procedure that forced a criminal defendant to choose between (1) waiving his Fifth Amendment privilege to testify at a disciplinary

hearing or (2) remaining silent and having an adverse inference drawn from that silence. The Court upheld the procedure holding that "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice." *Id.* at 320. The alleged choice offered here -- between a clemency interview and no interview -- is no different. As Judge Nelson recognized in dissent below, the Ohio procedure is "precisely analogous" to *Baxter*. (A-40). Judge Nelson is right. Nor are *Crampton* and *Baxter* the only precedents in which the Court permitted procedures that forced defendants to choose between exercising one right or another. *See Brown v. United States*, 356 U.S. 148 (1958) (one who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination); *Spencer v. Texas*, 385 U.S. 554 (1967) (a defendant who takes the stand in his own behalf may be impeached by proof of prior convictions or otherwise inadmissible evidence). The Sixth Circuit's divergence from these established precedents independently supports the writ.

B. The Decision Below Implicates A Question of Great National Importance.

Much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development or another or advancing one legal right over another. The right to testify, to use the most obvious example, cannot simultaneously be exercised with the right to remain silent -- and vice versa. Yet under the Sixth Circuit's reasoning, state and federal actors may no longer rely on this long-accepted truth. Removing the opportunity to present defendants with free (albeit difficult) choices undermines authority to allocute at sentencing for a potentially lighter sentence, to plea bargain for a potentially

lighter sentence, to cast light on remaining silent at a prison disciplinary hearing, to force someone to present an alibi defense, or ultimately even to cross-examine individuals that agree to testify at trial. Such a wide-ranging theory of unconstitutional conditions by itself warrants review. Add to this the normal discretion given to the States over clemency, together with the earlier reasons noted for reviewing such issues, and it becomes even more important to review this component of the decision promptly.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request the Court to grant the writ.

Respectfully Submitted,

BETTY D. MONTGOMERY
Attorney General

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

Date: May 5, 1997

No. 95-4099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE WOODARD,
Plaintiff-Appellant,

v.

OHIO ADULT PAROLE AUTHORITY, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed March 3, 1997

Before: MERRITT, NELSON, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court. MERRITT, J. (p. 28), delivered a separate concurring opinion. NELSON, J. (pp. 29-38), delivered a separate opinion concurring in part and dissenting in part.

KAREN NELSON MOORE, Circuit Judge. This is a § 1983 action involving Ohio's death-penalty clemency procedures. Eugene Woodard, a death-row inmate, seeks injunctive relief against the Ohio Adult Parole Authority, arguing that its clemency procedures violate due process and various other constitutional rights. The district court entered a judgment on the pleadings against Woodard, finding his claims to be wholly without merit. Although the court's analysis was not entirely incorrect, its discussion was incomplete and its conclusions, in significant respects, premature. As a result, we vacate the judgment in part and remand for further proceedings.

I. BACKGROUND

The underlying facts associated with Woodard's aggravated murder conviction are not particularly germane to this appeal. Nevertheless, we pause to observe that Woodard apparently killed his victim during a carjacking by him and his accomplices in southeastern Cleveland. *See State v. Woodard*, 623 N.E.2d 75 (Ohio 1993). Woodard was nineteen years old at the time. His conviction and death sentence were affirmed by the Ohio Court of Appeals and Ohio Supreme Court, *see id.*, and the U.S. Supreme Court denied certiorari, *Woodard v. Ohio*, 114 S. Ct. 2770 (1994).

Although the Ohio Supreme Court set October 7, 1994 as Woodard's execution date, a stay was issued on August 24, 1994 so that Woodard could pursue state post-conviction relief. Because the execution was not stayed 45 days in advance, however, the Ohio Adult Parole Authority (APA) initiated the clemency process in his case, notifying his counsel on September 6 that a hearing would be held on September 16. In addition, the APA informed Woodard's attorneys that if he desired a pre-hearing interview with the APA, such an interview would be available on September 9. Woodard's counsel objected to the short notice given by the APA, pointing out that they had only recently been assigned to represent him. Counsel further sought assurances from the APA that any clemency procedures would not interfere with their representation of Woodard—namely, that counsel would be permitted to attend and participate in the scheduled interview and hearing. When the APA did not respond, Woodard filed this § 1983 action on September 14, 1994, moving additionally for a temporary restraining order against any clemency procedures in his case. According to Woodard, a premature review would serve as an obstacle to a later, more timely clemency review, because such later review could only be obtained by leave of the APA.

On September 16, a consent decree was filed, postponing the clemency proceedings indefinitely. Defendants then moved for a judgment on the pleadings, stating that Woodard could prove no set of facts to support any of his claims. The magistrate judge to whom the case had been referred agreed, noting that the Governor's broad discretion in making clemency decisions meant that Woodard lacked any protected liberty interest in the clemency procedures which might be subject to due process requirements. The magistrate judge also found that Woodard did not have a substantive due process claim, that the clemency procedures did not violate Woodard's privilege against self-incrimination, that Woodard did not have a right to counsel in the clemency proceedings, and that the Eighth Amendment prohibition against cruel and unusual punishments was not implicated in this case. The magistrate judge did not address Woodard's additional equal protection and Ninth Amendment arguments. Despite objection, the district court adopted the magistrate judge's report and recommendation in full and entered judgment against Woodard. This appeal followed.

II. PROCEDURAL DUE PROCESS

We start with what is undoubtedly the most complicated issue in this case: procedural due process. Close scrutiny of Woodard's and amici's briefs reveals that there are actually two kinds of procedural due process arguments to be extracted therefrom, although these arguments are hardly apparent at first glance: one relates to the deprivation of a life or liberty interest arising from the clemency procedures themselves; the other deals with the general deprivation of life or liberty that begins with the initial criminal prosecution and ends with the clemency decision. In the first type of argument, the inquiry focuses on whether a life or liberty interest exists in clemency and whether it has been deprived by the clemency procedures. In the second, the question is

the degree to which the clemency procedures play a necessary role in the state's overall scheme of prosecution and punishment. Given the opacity of these abstract formulations, it is understandable that the district court only recognized the first approach—in our view, the one less helpful to Woodard. As these concepts require further explanation, we set forth our analysis in some detail, beginning with basic doctrine.

A. Deprivation of a Life or Liberty Interest in the Clemency Procedures Themselves

1. *Basic Doctrine*

When a state acts to deprive someone of his or her interest in life, liberty, or property, that deprivation must take place in accordance with due process of law. *See* U.S. CONST. amend. XIV, § 1. Three questions are thus instantly generated for any given situation: (1) is there a life, liberty, or property interest at stake here? (2) is there a deprivation of that protected interest? and (3) if so, what process is due? Sometimes, a state will do something disadvantageous to an individual by, for example, summarily terminating his employment or suddenly moving her from a prison to a mental hospital. The question whether a protected property or liberty interest exists in such instances of deprivation is the threshold inquiry, and according to prevailing doctrine, state law controls as to the existence of a property interest. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985) (termination of public employment); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-12 (1978) (termination of utility service). As to whether there is a liberty interest at stake, however, the Supreme Court has made it clear that both state law and the Due Process Clause itself may create such an interest. *See Sandin v. Conner*, 15 S. Ct. 2293, 2297-2302 (1995) (transfer from Hawaii prison to California prison); *see also* RICHARD

FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 557-62 (4th ed. 1996). According to the Court, a liberty interest may arise from federal law when the change in a prisoner's situation is "not within the range of conditions of confinement to which a prison sentence subjects an individual"—that is, when it is "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983) (quoting *Vliek v. Jones*, 445 U.S. 480, 493 (1980)). In addition, state procedures may create liberty interests that are deprived when a state actor deviates from these procedures. *Sandin*, 115 S. Ct. at 2299-2301. Of course, even though state law plays a role in determining the existence of property or liberty interests, the ultimate question of the degree of due process protection to be afforded under the Constitution remains a federal one.

Usually, disputes over "liberty" interests arise in the prison context, where some change in the circumstances of incarceration forms the basis for a due process claim. Although it provides the most common ground for complaint, the change does not always have to involve a transfer from one type of imprisonment to another. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), inmates challenged the prison authorities' summary revocation of good time credits. In *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), plaintiffs sought a declaratory judgment that the Connecticut board's commutation and pardon procedures did not comport with procedural due process.

2. *The Existence of a Federally Created Life or Liberty Interest*

In this case, Woodard contends that the Ohio clemency procedures are constitutionally defective under the foregoing

framework. His primary difficulty, however, lies in showing the existence of a protected life or liberty interest. First, as far as the Due Process Clause itself is concerned, the Supreme Court has decisively rejected the argument that federal law can create a liberty interest in clemency. *Dumschat*, 452 U.S. at 464-65. According to the Court, "The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id.* at 465.

Woodard tries to distinguish *Dumschat* by noting that the claimants in that case were only non-capital inmates—that unlike them, he has a more powerful *life* interest at stake in the clemency proceedings. Although Woodard correctly points out that capital punishment is constitutionally unique and that its imposition generally requires extra procedural protections, he is unable to demonstrate how his death sentence can form a principled basis for departing from *Dumschat's* rationale. In *Dumschat*, the Court explained that the claimed liberty interest must derive from the state's actions *after* a valid conviction and sentence. *Id.* at 463-65. In other words, the fact of an inmate's incarceration does not itself give rise to a liberty interest, because it is assumed that the inmate's "original" liberty interest—i.e., the one he possessed before he was arrested, charged, and convicted for his crime—has already been (or is still being) afforded due process: the right to trial, appeal, post-conviction remedies, and similar process. The liberty interest here, after incarceration, must come from actions taken by the state to change the prisoner's present situation, and the question becomes whether procedural due process places any constraints on making that change. Such liberty-affecting change is easiest to see when prison authorities move an inmate from one prison to another, or from a prison to a mental hospital. It is far more difficult to identify when the parole authorities simply alter their mode of dealing with

clemency applications. In the latter case, rather than a tangible, further restraint on one's freedom, the state's action constitutes only a change in a prisoner's expectations concerning the likelihood of a pardon or commutation. As stated by the Court, a "felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." *Dumschat*, 452 U.S. at 465 (footnote omitted).

The same rationale applies to the life interest claimed by Woodard. Woodard's "original" life interest—his right not to be sentenced to death—is already covered by independent process: his trial, appeal, habeas petitions, and even (as will be discussed in Part II.B below) his clemency application. In order to argue that Ohio's clemency procedure by itself impinges upon a protected life interest, however, he must point to a separate act that might constitute a deprivation of that interest—a separate, life-affecting change in his situation. In this case, the change is no different from that in *Dumschat*. It is just a change in expectation as to the possibility of having his sentence commuted.

Woodard also tries to distinguish *Dumschat* by arguing that the asserted life and liberty interest here is not in being granted clemency, but in having "a meaningful clemency procedure." Appellant's Br. at 6. This argument makes the error of confusing the liberty or life interest with the process that is due. Woodard can only be entitled to a meaningful procedure, the process that is due, if he first shows the deprivation of a protected constitutional interest—life, liberty, or property. The protected interest cannot be the process itself. In *Dumschat*, the plaintiffs also sought "meaningful" clemency procedures—including a statement of reasons for the parole board's decision—but the Court made it plain that

the Constitution gave them no right to such procedures until they could first demonstrate a cognizable liberty interest. *Id.* at 463-67.

3. *The Existence of a State-Created Interest*

Woodard next asserts that even if there is no federally created life or liberty interest in clemency, Ohio's statutory scheme creates such an interest. Again, this claim is squarely met by contrary case law. In addition, the Supreme Court's recent decision in *Sandin v. Conner*, 115 S. Ct. 2293 (1995), does not alter our view in this regard.

Pre-*Sandin* doctrine was relatively straightforward. Under that framework, a state could create protected liberty interests "by placing substantive limitations on official discretion." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Thus, if state rules set forth mandatory procedures for prison transfers, and prison officials deviated from those procedures, there might be a deprivation of a state-created liberty interest. On the other hand, if state procedures essentially allowed "unfettered discretion" in making the ultimate decision, no constitutionally protected liberty interest would be created, even if some of the procedures leading up to the final decision might be couched in mandatory terms. *Id.* at 249-50; *see also Sweeton v. Brown*, 27 F.3d 1162, 1164-65 (6th Cir. 1994) (en banc) (following *Olim*), *cert. denied*, 115 S. Ct. 1118 (1995). In all material respects, this case is indistinguishable from *Olim*. Although Woodard and the ACLU place great emphasis on the fact that the Governor of Ohio must wait for a recommendation from the APA before making a decision,[1] the critical point, which even

[1]In *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994), the Ohio Supreme Court invalidated a pardon granted by Governor Richard Celeste, because Celeste had failed to wait for an APA recommendation as required by statute. The court simultaneously upheld eight statutorily "premature" commutations by Celeste, because the court concluded that the Ohio Constitution only allowed the General Assembly to place procedural restrictions on the Governor's pardon power, not the power to grant reprieves or commutations.

In 1995, the Ohio Constitution was amended by referendum, allowing the General Assembly to make the Governor follow additional procedures before granting commutations, as well as pardons. *See* Ohio Const. art. III, § 11.

Although the cumulative effect of these changes can only be to make the granting of clemency slightly more difficult (at least as a practical and political matter), it is clear that there is still no substantive restriction on the Governor's discretion.

Woodard acknowledges, is that the Governor "is not bound by the Ohio APA's recommendation." Appellant's Br. at 23. Under *Olim*, it does not matter whether the APA must follow elaborate, mandatory procedures, and it does not matter whether the APA's recommendation is itself discretionary or tightly regulated. The only thing that counts is that there are "no standards governing the [final decisionmaker's] exercise of his discretion." *Olim*, 461 U.S. at 243, 249-50. In Ohio, the final decisionmaker's discretion is entirely "unfettered."

Sandin has now modified this analysis, although its ultimate effect on the pre-existing framework remains uncertain. Faced with a situation involving mandatory prison regulations, the Supreme Court in *Sandin* decided to change course, holding that the mandatory/discretionary distinction which had been developed in prior decisions would no longer be controlling. According to the Court, the case law delineating the mandatory/discretionary rubric "has produced at least two undesirable effects. First, it creates disincentives

for States to codify prison management procedures in the interest of uniform treatment. . . . Second, the . . . approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 115 S. Ct. at 2299. As a result, the *Sandin* Court formulated a new approach, which continued to "recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause," but cautioned that these interests would "be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 2300 (citations omitted). Stated differently, the prison authorities' actions would need to "present a dramatic departure from the basic conditions of [the inmate's] sentence." *Id.* at 2301.

Notably absent from the Court's opinion is any explanation as to how a state might actually create these liberty interests. As a result, it remains unclear whether the Court intended to eliminate the mandatory/discretionary distinction altogether, looking to alternate means of protecting "atypical and significant" hardships under state law, *see Sandin*, 115 S. Ct. at 2306 (Breyer, J., dissenting) (expressing uncertainty as to the majority's intent), or whether the Court simply intended to set up a further requirement for forming state-law liberty interests, making mandatory language in state procedures a necessary but no longer sufficient condition in finding such interests. *See id.*; RICHARD FALLON, DANIEL MELTZER & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 560-61 (4th ed. 1996). Under the latter interpretation, there would be no change to our analysis of Woodard's situation under *Olim*, because the final

decisionmaker's discretion in Ohio remains uncabined. Under the former interpretation, we would no longer be able to rest our holding on *Olim*, but we would still conclude that Woodard is not entitled to relief. Even if state law can recognize and create liberty interests through means other than mandatory or discretionary language, it cannot be said that a change in a prisoner's expectations regarding the likelihood of being granted clemency may be deemed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *Sandin*, 115 S. Ct. at 2300, given that the Supreme Court has already effectively held, in *Dumschat*, that such an expectation is not "qualitatively different from the punishment characteristically suffered by a person convicted of crime," *Vitek v. Jones*, 445 U.S. 480, 493 (1980), and given that the *Sandin* Court did not even consider the harsh change in conditions presented in its own case—disciplinary, segregated confinement for 30 days—to impose an "atypical and significant hardship." In short, we do not need to decide which of these interpretations of *Sandin* is the correct one, as Woodard is simply unable to prevail under either.

Because Woodard cannot demonstrate the existence of a protected life or liberty interest arising from the clemency procedures themselves, this first strand of procedural due process analysis is ultimately of little assistance to him. Also, because no such interest exists, it remains unnecessary for us to reach the question of what process might be due.

B. The Role of Clemency in the Overall Scheme of Adjudication

In our view, the district court's focus on the foregoing strand of due process analysis, though analytically correct, as far as it goes, indicates that the court did not take account of the second strand—an approach that centers on the role of

clemency in the entire punitive scheme. Under this approach, the district court should not have held that Woodard was entirely without a procedural due process claim. The court should have identified Woodard's "original" life and liberty interests under *Evitts v. Lucey*, 469 U.S. 387 (1985), and it should then have proceeded to an inquiry of the degree of process that would be due.

As mentioned in Part II.A.2 above, Woodard has always had "original" liberty and life interests in not being imprisoned and in not being executed by the state. These interests could only be deprived with due process of law, which at a minimum would include the choice of having a trial conducted in accordance with the Sixth Amendment. *See* U.S. CONST. amend. VI. The Constitution does not require a state also to provide a system of appeals, but if the state chooses to do so, the appeal, too, must comply with the basic requirements of due process. *Evitts*, 469 U.S. at 393. As stated in *Evitts*: "[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). As this circuit has observed:

> Implicit in this conclusion is the idea that the enactment of an appellate system necessarily "alter[s] the balance between the layers of adjudication in a constitutionally significant manner" . . . . That is, the introduction of a second tier of adjudication unavoidably affects the operation and significance of the first tier. For this reason, due process places constraints on an appeal even if it does not require an appeal in the first place. The appeal forms an

> "integral" and inextricable part of the procedures for determining whether a defendant should be deprived of his life, liberty, or property.

United States v. Smith, 94 F.3d 204, 207 (6th Cir. 1996) (citation omitted), *cert. denied*, ____ S. Ct. ____, 1996 WL 757264 (Feb. 18, 1997) (No. 96-7259).

This reasoning logically applies to further proceedings made available by the government, as well: discretionary appeals, post-conviction proceedings, clemency procedures. The degree to which each component forms "an integral part" of the overall adjudicative system determines the degree to which due process plays a role. Of course, the more distant the procedure from initial proceedings, the less stringent the requirements must be. For example, the speedy trial guarantee is well established under the Sixth Amendment, but courts have only recently begun to recognize the right to a speedy criminal *appeal* under the Due Process Clause. *See, e.g., Smith*, 94 F.3d at 206-07. Similarly, a defendant has the right to counsel in the first appeal as of right, *Douglas v. California*, 372 U.S. 353 (1963), but no such right exists in post-conviction proceedings, even for capital defendants. *Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

Should proceedings as far down the line as death-penalty clemency procedures be analyzed under this overall framework? We believe so. Like appeals, clemency procedures are not required by the Due Process Clause, yet all thirty-eight states authorizing capital punishment make provisions for clemency. *See Herrera v. Collins*, 506 U.S. 390, 414 (1993) (noting that "all 36 states" allowing capital punishment at the time had "constitutional or statutory provisions for clemency"); Kan. Const. art. I, § 7, Kan.

Stat. Ann. § 22-3701; N.Y. Const. art. IV, § 4, N.Y. Correct. Law §§ 261-66. Furthermore, as the Supreme Court itself emphasized in *Herrera*, "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." 506 U.S. at 411-12. Indeed, the Court in *Herrera* explicitly relied on the existence of executive clemency in denying habeas relief to a petitioner claiming "actual innocence." *Id.* at 411-17. Given this clear recognition by the Court of the integral part played by clemency in every state's death-penalty scheme, we find it only rational to apply *Evitts's* principle in equal measure to the clemency procedures. We acknowledge at the same time that the due process at the clemency stage will necessarily be minimal, perhaps even barely perceptible, because of the great distance from the truly fundamental process—the trial, the appeal—and the significant distance from other extremely important process—discretionary appeals and post-conviction petitions.[2]

This gives rise to the question whether an action under 42 U.S.C. § 1983 provides the appropriate vehicle for raising this type of due process claim. In our opinion, it does—more so than a habeas petition under 28 U.S.C. § 2254. In *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), the Supreme Court held that a state prisoner challenging the "fact or duration of his physical imprisonment" and seeking "immediate release or a speedier release" would be limited

[2]We assume here that clemency procedures will normally fall last in line, as a final recourse for prisoners who have expanded all possible effort in the courthouse, even though such procedures are certainly flexible enough to be pushed forward in line. For instance, state authorities in this case attempted to hold the clemency proceedings while Woodard's state post-conviction petition was still in its initial stages.

to in his federal remedies to a writ of habeas corpus. *Preiser* is distinguishable from the instant case, however, because Woodard "is not claiming that he is entitled to clemency or that the [APA] should have granted his request. Instead, he is challenging only the process by which the [APA would consider] his request for clemency. . . ." *Oley v. Hopkins*, 5 F.3d 1125, 1131 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2768 (1994). Indeed, the Court in *Preiser* itself suggested that a § 1983 action would be the proper approach if the prisoner were "attacking something other than the fact or length" of his sentence and "seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus." 411 U.S. at 494. Consequently, notwithstanding the interrelationship between successive stages of adjudication under *Evitts*, it is an injunction under § 1983 that provides the more suitable means of reforming the clemency procedures, where the prisoner is not directly laying claim to clemency itself, or any other form of instant relief from his sentence. As stated by the Eighth Circuit in *Oley*, "This is not the stuff of redress which can be sought under § 2254." 5 F.3d at 1131.

We come, then, to the ultimate question: how much process is due? It appears that a court must ultimately address in this constitutional question by making a normative judgment about functions of various procedures—e.g., what counts as a "trial"? what are the minimum requirements for an "appeal"?—something for which there is very little guidance by the time we arrive at clemency procedures. In *Evitts*, the Court used the touchstone found in *Douglas v. California*, 372 U.S. at 358, for the first appeal as of right: whether the appeal would be a "meaningless ritual" without the claimed procedural entitlement. 469 U.S. at 394. In *Evitts*, the Court decided that an appeal without the effective assistance of counsel would be one such meaningless ritual. In *United States v. Smith*, this circuit employed the same principle in

recognizing the right to a speedy criminal appeal, noting that excessive delay could also render an appeal "meaningless" for all practical purposes. 94 F.3d at 207-08.

In clemency, we are confronted with procedures that are frequently informal and almost always overwhelmingly discretionary. Once a state chooses to adopt a clemency process, what are the minimum characteristics to be expected? What goes into a baseline "death-penalty clemency procedure"? These are delicate questions, which courts—and especially federal courts—should approach with great caution and deference. Nevertheless, it is not too difficult to imagine extreme situations in which federal due process would be offended. For example, a procedure in which a governor or parole board merely pulled names out of a lottery bin or flipped coins to make clemency decisions would undoubtedly constitute a "meaningless ritual." Similarly, a death-penalty "clemency hearing" occurring immediately after conviction but before commencement of a defendant's sentencing proceedings would be almost equally without meaning.

In this case, Woodard argues that the APA's current procedures provide inadequate notice and opportunity to be heard, for a number of reasons. We decline to address his specific due process arguments at this time, however, because we conclude that this case must in any event be remanded to the district court for additional proceedings on Woodard's Fifth Amendment claim (discussed in Part III below). Because the district court did not consider this second strand of procedural due process analysis, holding instead that the Fourteenth Amendment was completely inapplicable to the state's clemency proceedings, we believe that the district court should be given the opportunity to address this due process claim in the first instance. On remand, the district court should analyze Woodard's specific

arguments under *Evitts* and the principles outlined above, keeping in mind that the clemency procedure is not necessarily a formal, adversarial proceedings, and that the APA is generally free to decide what sources of information and evidence would best serve its informal investigation. Whether or not the district court ultimately finds merit in Woodard's due process contentions, it is undeniably better equipped to be the first to evaluate them, as we are limited on this appeal to consideration of the parties' bare pleadings.

III. THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Woodard claims that the APA's clemency interview procedure burdens his privilege against self-incrimination because it provides for a private, uncounseled interview without a guarantee of immunity for the things he might say. The district court ruled that no such burden exists here because the interview is completely voluntary, an optional procedure that Woodard is free to accept or decline. In so holding, the court cited *Simmons v. United States*, 390 U.S. 377, 389-94 (1968), but *Simmons* does not provide any support for that conclusion. More important, the district court did not consider whether the interview procedure might impose an unconstitutional condition on one of Woodard's fundamental rights.

A. The Doctrine of Unconstitutional Conditions

On appeal, the Ohio Death Penalty Task Force's amicus brief argues that under *Simmons*, the APA should be required to modify its interview procedure so as not to violate the Fifth Amendment (applicable to the states via the Fourteenth Amendment). *Simmons*, however, involved a situation in which the defendant was forced to choose between pressing a Fourth Amendment claim and asserting his Fifth

Amendment privilege against self-incrimination. According to the Supreme Court, this situation was "intolerable" because an "undeniable tension" had been created between two constitutional rights. 390 U.S. at 394. The instant case, on the other hand, presents no such tension—the only constitutional right at issue is Woodard's Fifth Amendment privilege. Consequently, we are not persuaded that *Simmons* by itself provides a basis for reversing the district court's judgment.

Instead, we are drawn to Woodard's argument that the Ohio procedure calls for death-row inmates to make a "Hobson's choice" between asserting the Fifth Amendment right and participating in the clemency review process.[3] This raises the specter of an unconstitutional condition, something which the district court did not address, and something which we believe now requires us to remand the case.

As explained by a leading commentator, "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its

[3]We are instructed by the Ninth Circuit that "[t]he phrase 'Hobson's choice' is often used incorrectly. The phrase comes from Thomas Hobson, an English liveryman who required every customer to choose the horse nearest the door. . . . A Hobson's choice is thus an apparently free choice when there is no real alternative. . . . Here, however [plaintiff] technically was not confronted with a Hobson's choice—rather, [plaintiff] was forced to choose between two harmful options." *Wang v. Reno*, 81 F.3d 808, 813 n.5 (9th Cir. 1996) (citations omitted).

receipt." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989). In every respect, Ohio's clemency interview procedure appears to fall within the doctrine's parameters. In Woodard's case, the "benefit" is the uncounseled clemency interview, and the "unconstitutional condition" is the requirement that he waive his Fifth Amendment right against self-incrimination.[4] The clemency interview undoubtedly presents a serious matter for Woodard, whose life may literally depend upon it, yet in deciding between this interview and the risk of self-incrimination, Woodard has been offered a choice by the state that can hardly be deemed a constitutionally encumbered one.

Once applied, the doctrine requires a court to employ strict scrutiny in analyzing the challenged condition. *See Shapiro v. Thompson*, 394 U.S. 618, 629-33 (1969). At this stage, with little evidence before us, there does not appear to be any compelling state interest in requiring waiver of Fifth Amendment rights by clemency interviewees. Indeed, it would seem to be in the state's own interest to encourage an open and frank interview, as far as this is possible, in order to help it decide whether mercy is ultimately appropriate. By the same token, a prisoner who still has ongoing post-conviction proceedings (such as Woodard) obviously has a measurable interest in avoiding self-incrimination. And there is always the possibility that a prisoner might be granted clemency but then be charged with different crimes that are revealed during the interview. As a result, unless a

[4]Of course, at this juncture, we cannot be certain that the defendants would actually impose this condition. However, they have not denied that they would, and we must accept all of the plaintiff's allegations as true in reviewing this judgment on the pleadings. *See Astor v. International Business Machines Corp.*, 7 F.3d 533, 538 (6th Cir. 1993).

compelling reason can be brought forward which counsels against applying the doctrine, we would hold that Woodard has raised a colorable unconstitutional conditions claim regarding the interview procedure, and we would vacate the judgment of the district court.

B. Problems in Applying the Doctrine

A number of reasonable objections might be raised against finding an unconstitutional condition. Although these arguments are certainly worthy of careful consideration, in the end they do not dissuade us from favoring an application of the doctrine. We consider these arguments in turn.

1. *The Clemency Interview As a "Benefit"*

First, there is the idea that the only possible "benefit" to Woodard is clemency itself. Therefore, the interview procedure does not pose as unconstitutional condition because it is just an optional event—i.e., even if Woodard were given the type of interview he wanted, he still might not get clemency, in which case the interview will have been worthless. There are two possible responses to this.

One, the interview may indeed be a benefit because it dramatically increases Woodard's chances of being granted clemency. Although we are not in a position to evaluate this hypothesis ourselves at this time, Woodard could conceivably produce evidence on remand that all, or the overwhelming majority, of the prisoners granted clemency were those who took advantage of the "optional" interview. In such event, the district court would be hard-pressed not to find a benefit in the interview.

Two, it is not entirely true that the interview is worthless without an actual grant of clemency. Giving Woodard the type of interview he desires—an open and frank discussion

with no danger of self-incrimination—would give Woodard the sense that he had participated meaningfully in the process, even if he were ultimately denied clemency. On these terms, the interview procedure may also be deemed a benefit.

In short, the interview has both *instrumental* and *intrinsic* value. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 663-77 (1988). Whether we accept one or both of these grounds, the argument that the interview is not a "benefit" deserves, at the very least, a remand.

2. *Applicability of the Doctrine in this Constitutional Context*

A more difficult question is whether the unconstitutional conditions doctrine should apply in the context of the Fifth Amendment. In general, the doctrine has only consistently been applied to protect First Amendment rights. *See, e.g., Board of County Comm'rs v. Umbehr,* 116 S. Ct. 2342 (1996) (free speech); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (free speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Free Exercise Clause); *Speiser v. Randall*, 357 U.S. 513 (1958) (free speech); *see also Dolan v. City of Tigard*, 512 U.S. 374, ---, 114 S. Ct. 2309, 2328 (1994) (Stevens, J., dissenting) (doctrine "especially" protects freedom of speech). Nevertheless, the Supreme Court has also employed it sporadically in other areas. *See Dolan*, 114 S. Ct. at 2317 (Takings Clause); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Takings Clause). Indeed, in *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969), the Court even held that conditioning welfare benefits on residency requirements impermissibly burdened the fundamental right of interstate travel. We are unable to discern any logical reason for holding the doctrine inapplicable to the Fifth Amendment here.

The doctrine can certainly be characterized as "unruly." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 13 (1988). As Professor Sullivan similarly observes, the Supreme Court's recent jurisprudence seems "a minefield to be traversed gingerly." Sullivan, 102 Harv. L. Rev. at 1415. However, it appears that much of the confusion surrounding the doctrine has focused on the "elusive distinction between withholding a subsidy and imposing a penalty." TRIBE, AMERICAN CONSTITUTIONAL LAW 781-84; *see also* Sullivan, 102 Harv. L. Rev. at 1439-42. In this area of confusion, the government may not *penalize* the exercise of a constitutional right, but the government retains the power to subsidize or encourage certain activities under its spending power. The trouble arises when by subsidizing one activity, the government is by negative implication penalizing another, and the "another" happens to involve a constitutional right. *Compare FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984) *with Regan v. Taxation with Representation*, 461 U.S. 540, 544-46 (1983).

The same problem is not present in the instant case. We are not dealing with monetary subsidies or tax exemptions by the government. The government cannot be said here to have a legitimate purpose in limiting its "encouragement" of clemency interviews to those inmates who relinquish their Fifth Amendment rights. For that reason, this case might perhaps be described as a "purer," and therefore easier, case of an unconstitutional condition—similar to the Supreme Court's Takings Clause cases, whether the benefits, zoning permits, are also non-monetary and (at least theoretically) unlimited. Indeed, in *Dolan*, the most recent Takings Clause decision addressing the issue, the Court describes the unconstitutional conditions doctrine as "well-settled." 114 S. Ct. at 2317. In light of this most recent pronouncement, we conclude that a degree of uncertainty in the doctrine is not a

sufficient basis for resisting its application.

3. *Application of the Doctrine in Light of Instances of Waiver of Rights*

The final possible obstacle to application of the unconstitutional conditions doctrine lies in instances where criminal defendants have waived constitutional rights in exchange for "benefits," without any resulting unconstitutional conditions problem. Two instances are particularly salient here: (1) the application of §3B1.1 of the federal Sentencing Guidelines, the "acceptance of responsibility" guideline, and (2) the testimony of defendants at their own criminal trials.

First, the federal courts have continued to uphold the constitutionality of USSG §3B1.1, *see e.g., United States v. Monsour*, 893 F.2d 126; 129 (6th Cir. 1990), which in many ways poses an unconstitutional condition like the one found in the instant case: the guideline gives defendants the "benefit" of a two-point or three-point decrease in offense level if they demonstrate "acceptance of responsibility"—that is, if they plead guilty and thereby give up their right to trial and privilege against self-incrimination. *See United States Sentencing Commission, Guidelines Manual*, §3B1.1 (Nov. 1995). How can we reconcile this acceptance of USSG §3B1.1 with the notion that the clemency interview procedure may pose an unconstitutional condition?

Second, in criminal trials generally, defendants retain the option of testifying in their own behalf, but if they do so, they also subject themselves to cross-examination on the witness stand. To a certain extent, this situation could also be characterized in terms of an unconstitutional condition: in order to be granted the "benefit" of testifying in their defense, defendants must give up their Fifth Amendment privilege against self-incrimination. Again, the question

arises whether the unconstitutional conditions doctrine must be rendered inapplicable in this context, and therefore in the similar, clemency-interview context, as well.

We should be careful to refrain from addressing issues not directly related to this case. Nevertheless, we note briefly that a reasonable argument could be made that both USSG §3B1.1 and the trial testimony situation would actually withstand a direct unconstitutional conditions challenge, even as they impinge upon the right against self-incrimination. A court might find what appears to be an unconstitutional condition in each instance, apply strict scrutiny, but ultimately conclude that the condition is narrowly tailored to furthering a compelling government interest. With respect to the sentencing guideline, a court might identify a compelling interest in encouraging a defendant to admit responsibility, first for the sake of rehabilitating the defendant, and second to maintain administrative order in the overcrowded criminal justice system. With respect to a defendant's testimony at trial, a court might conclude that the entire purpose of the defendant's testimony is to serve the truth-seeking function of an adversarial, criminal trial—a purpose that would be subverted if only one side of the story were allowed to be presented. Whereas a trial is specifically designed to determine the guilt or innocence of the defendant—the very subject matter for which the Fifth Amendment right is considered necessary—a clemency review is designed for something very different: to determine whether a prisoner is entitled to the state's mercy—something which may or may not include consideration of the defendant's culpability. For this reason, a defendant who testifies at her own trial may properly be deemed to have waived the right against self-incrimination, whereas no such assumption is warranted for a prisoner who chooses to speak to state officials regarding the possibility of being granted a pardon, commutation, or reprieve.

Furthermore, in the trial testimony instance, the argument could be made that no condition on any constitutional right even exists. Because the prosecution always bears the burden of proving its case, and because non-defendant witnesses are generally subject to the government's subpoena, the fact that distinguishes a defendant from other individuals in a case is his ability *not* to testify and *not* to be subject to questioning by the prosecution. In other words, the primary "benefit" to the defendant is the right to refuse testimony, not the ability to give it. Any benefit enjoyed by a particular defendant in speaking in her own defense is necessarily subordinate to the more important benefit of being able to remain silent while the government attempts to prove its case. Again, that is one of the main protections the Fifth Amendment right was designed to accomplish.

Despite that protection, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Supreme Court upheld the imposition of a choice between waiving the Fifth Amendment privilege to testify at a prison disciplinary hearing, and remaining silent and having an adverse inference drawn from that silence. *Id.* at 316-20. Though the Court did not analyze the issue in terms of a choice, but rather assessed the legality of the adverse inference, *Baxter* does appear on the surface to be analogous to this case. A prison disciplinary hearing, however, serves very different purposes and implicates very different interests than a clemency interview. In a prison disciplinary hearing, as in a criminal proceeding, the burden of proof is on the state; in the clemency process, however, the burden is entirely on the prisoner. A prison disciplinary hearing serves the purpose of determining whether a prisoner has violated prison rules, so that he or she may be punished, while a clemency interview serves the purpose of supporting a prisoner's plea for mercy, so that he or she may be permitted to live or receive leniency. The necessity of speaking openly to the state, therefore, is much greater in the

clemency context than in *Baxter*, and more similar to *Simmons*. *Baxter*, therefore, is clearly distinguishable and does not affect our analysis of the clemency interview.

In the present context it is the prisoner who must demonstrate his eligibility for clemency, and so his refusal to engage in an interview can only in the most improbable of circumstances be considered a benefit. Moreover, there does not appear to be any persuasive reason why the APA should condition the benefit of an uncounseled clemency interview on the waiver of the prisoner's Fifth Amendment right. Whereas the prisoner's interest in trying to obtain clemency appears quite strong, the state's interest in insisting on such a waiver appears comparatively weak. The possibility of damage to a state interest by applying the privilege seems remote, but the prisoner's risk of self-incrimination is significant. Though "an act for which a person has been convicted no longer tends to criminate, in the sense of the privilege," VIII *Wigmore on Evidence* §2279 (3d ed. 1940), a defendant who has not exhausted all post-conviction remedies still faces a risk of self-incrimination. If a defendant obtains a new trial, incriminating statements made during the appeal or post-conviction process, including those made during a clemency interview, might be admitted as evidence in that trial. Furthermore, an open-ended clemency interview could elicit incriminating statements regarding other acts unrelated to the prior conviction and could support new prosecutions for additional crimes. A coerced waiver of the privilege is particularly troubling here, where the state has arrange for the clemency review process to take place before or during Woodard's post-conviction proceedings in state court.[5]

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[5]Though this case especially raises concerns because of the ongoing post-conviction proceedings, we note that we do not rest our holding on that fact—a prisoner who had exhausted his post-conviction remedies might still risk self-incrimination with regard to other acts, and therefore might be subjected to the same unconstitutional condition.

Because this case is before the court on the pleadings, the facts have not yet been fully developed. We remand to the district court to determine more fully the nature of the APA's clemency procedures. If it is indeed the case that Woodard must risk self-incrimination to participate in the "optional" clemency interview, the district court should apply the unconstitutional conditions doctrine.

If the court on remand does find that the clemency process imposes an unconstitutional condition, one possible resolution of the Hobson's choice is illustrated in *United States v. Bounos*, 693 F.2d 38 (7th Cir. 1982). Writing for the court, Judge Posner held that individuals who were compelled to testify by a Hobson's choice—between asserting their double jeopardy claims and retaining their Fifth Amendment rights—did not waive the privilege against self-incrimination. *Id.* at 40. In fact, the court held that the government's position that they would waive the privilege by testifying in the double jeopardy hearing was "untenable in light of *Simmons*. . . . " *Id.* Although Seventh Circuit law did not recognize judicially created use immunity, "[t]he Fifth Amendment of its own force without the superaddition of a judicial immunity order" would prevent the government from using the individuals' statements against them in a subsequent prosecution. *Id.* Of course, such a holding in the case at hand would be premature at this point; the district court must first find the facts and determine whether an unconstitutional condition exists.

IV. EQUAL PROTECTION AND REMAINING CLAIMS

Woodard raised an equal protection claim in his complaint,

and he raises it here on appeal. Unfortunately, he failed to object when the magistrate judge did not address it in the report and recommendation to the district court. This failure is made more glaring by the fact that Woodard *did* object to the magistrate judge's omission of the Ninth Amendment claim. As a consequence, it seems that Woodard has waived the claim on this appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). Even if we were to address the claim on the merits, it is doubtful that we would find grounds for ruling in Woodard's favor. First, capital inmates are not a suspect class, contrary to Woodard's suggestion. Second, the State of Ohio could have a rational basis for treating capital and non-capital prisoners differently in clemency proceedings.

Woodard's remaining substantive due process, Eighth, and Ninth Amendment claims are equally without merit. Woodard cannot show a fundamental right to clemency—as noted earlier, the Due Process Clause does not necessarily guarantee even a first appeal as of right. Similarly, as long as procedural due process is not offended, there can be no independent Eighth Amendment argument that the clemency procedures inflict "cruel and unusual punishment." Finally, there is no precedent for attaching clemency rights to the Ninth Amendment.

V. CONCLUSION

The issues presented in this case are undoubtedly complicated and novel, but they also are not fully formed. As a consequence, because we conclude that Woodard has raised a Fifth Amendment argument warranting further scrutiny, we find it necessary to remand this case to the district court. On remand the district court should move beyond the pleadings stage and determine based on evidentiary materials whether Woodard must risk self-

incrimination to participate in the clemency interview under the APA's procedures; if so, the district court should apply the unconstitutional conditions doctrine as discussed in Part III. In addition, we disagree with the district court's determination that procedural due process is irrelevant to an evaluation of the state's death-penalty clemency procedures. On remand, the district court should reconsider Woodard's due process arguments in light of *Evitts v. Lucey* and related case law and in light of relevant evidentiary materials submitted by the parties. Finally, on all remaining arguments by Woodard, we affirm the district court.

AFFIRMED, in part, **VACATED** in part, and **REMANDED.**

MERRITT, Circuit Judge, concurring. I concur fully in the result and in the reasoning of Judge Moore's opinion for the Court in Sections I, II and IV. I concur in the result reached but not all of the language and reasoning of part III of Judge Moore's opinion. I concur in the result reached in part III because I agree that the case should be remanded to the District Court for findings and conclusions on the Fifth Amendment argument raised by Woodard.

DAVID A. NELSON, Circuit Judge, concurring in part and dissenting in part. Insofar as this court's judgment affirms that of the district court, I concur. Insofar as the judgment of the district court is vacated and the case remanded for further proceedings, I respectfully dissent.

I

On the evening of June 20, 1990, a 19-year-old college student named Mani Akram was driving an Oldsmobile car down Harvard Avenue near East 175th Street in the city of Cleveland. The vehicle was equipped with custom wheels

and a special stereo system.

Four young men who had decided to go "gaffling"[1] in a car stolen earlier in the evening spotted Mr. Akram's vehicle and intentionally collided with it. Two of the gafflers got out of the stolen car, and one of them -- identified by an eye witness as appellant Eugene Woodard -- went up to the Oldsmobile and shot Mr. Akram in the chest with a handgun.

Mr. Akram, who subsequently died from the wound, was dumped on the ground and left there for dead. His car was driven away, stripped, and torched. The gafflers argued over the division of the spoils, and a witness testified at trial that he heard Mr. Woodard say "I should get the radio. I'm the one that shot the guy." Other witnesses testified that they heard Mr. Woodard make similar statements, including, "I'm the one with the murder case," and "if the nigger die, it's me that shot him, so I should get the most." See *Woodard*, 68 Ohio St. 3d at 71, 623 N.E.2d at 76-77.

An Ohio jury found Mr. Woodard guilty of a number of crimes, including aggravated murder in the commission of a felony. The jury recommended imposition of the death penalty, and this recommendation was accepted by the trial court. Affirmances by a state court of appeals (see *State v. Woodard*, 1992 WL 84888 (Ohio App. 8th Dist. Apr. 23, 1992)) and the Supreme Court of Ohio followed. Mr. Woodard is now pursuing collateral remedies in the Ohio courts, as I understand it. His lawyers have said that if these efforts are unsuccessful, Woodard will seek habeas corpus relief in the federal courts.

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[1]The term has been defined as "forcibly removing people from their cars to rob them." *State v. Woodard*, 68 Ohio St. 3d 70, 71, 623 N.E.2d 75, 76 (1993), *cert denied*, 114 S.Ct. 2770 (1994).

Should these attempts to obtain collateral relief meet the same fate that the direct appeals did, Mr. Woodard plans to throw himself on the mercy of Ohio's governor. Article III, §11 of the Ohio Constitution, as amended effective January 1, 1996, empowers the governor "to grand reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper. . . ." As noted in the report and recommendation issued by the magistrate judge in the present civil rights action, "the Governor enjoys almost unfettered discretion in determining whether to grant or deny clemency." (Citation omitted.)

The manner of applying for pardons has long been subject to regulation by the Ohio General Assembly, and the constitutional amendment that became effective at the beginning of 1996 subjected the manner of applying for commutations to such regulation as well. It is crystal clear, however, that the legislature may not prescribe substantive regulations limiting the Governor's discretion to grant or withhold either type of clemency. "For example, the General Assembly could not . . . enact a statute requiring the Governor to accept the recommendation of the [Ohio Adult Parole Authority] in the exercise of his clemency power." *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 520, 644 N.E.2d 369, 375 (1994).

Under Ohio Rev. Code §2967.07, all applications for executive clemency must be made in writing to the Ohio Adult Parole Authority. Mr. Woodard has not yet submitted such an application. The parole authority (or "parole board," as it sometimes calls itself) nonetheless scheduled a "clemency review" for Mr. Woodard to be held on September 16, 1994. In connection with the review Mr. Woodard was notified that he could have a pre-hearing interview with representatives of the parole board if he

wished. This notification prompted the filing of the present civil rights suit, in which Mr. Woodard seeks a declaration that Ohio's death penalty clemency procedure is unconstitutional.

There appears to have been nothing sinister in the parole board's decision to initiate a clemency review before the filing of an application therefor. Under an Ohio Department of Rehabilitation and Correction regulation that became effective on July 21, 1994 -- the "Death Penalty Clemency Procedure" challenged here by Mr. Woodard -- the parole board must schedule a clemency review 45 days in advance of any scheduled execution date, unless that date has been stayed. The Ohio Supreme Court did not stay Mr. Woodard's execution until after the 45-day clock had started running, so the parole board seems to have had no choice in the matter. On the day after the filing of the complaint in the present lawsuit, however, the parties agreed to postpone the clemency review and not to reschedule it during the pendency of the suit without 30 days' notice. The district court subsequently entered a consent order to that effect.

If and when the parole board has occasion to reschedule the clemency review, the challenged regulation will give Mr. Woodard the option of requesting a personal interview. Part IV C.2. of the regulation provides as follows:

> "If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by the parole board chair shall be present at the interview."

The regulation goes on to provide that any statement given

by the prisoner at the interview shall be considered at the clemency hearing, along with all other relevant information that is available. (Such information can, of course, include affidavits, briefs, or other materials submitted by the prisoner's counsel.)

It was the submission of the parole board, in its motion for judgment, that an executive clemency review is not an integral part of any prior judicial proceedings; that there is no constitutional right to counsel at a clemency interview conducted pursuant to the prisoner's request; and that Ohio's executive clemency procedure does not compel the prisoner to be a witness against himself in violation of the Fifth Amendment. Magistrate Judge Kemp and District Judge Kinneary agreed with these submissions. I agree with them too.

II

The Declaration of Independence declares it to be self-evident that all men are endowed by their Creator with unalienable rights to life and to liberty. These God-given rights are not absolute -- if a Eugene Woodard takes the life of a Mani Akram in the commission of a felony, for example, the murderer obviously runs a risk that the state may take his life in return -- but our Constitution prohibits a state from depriving any person of life or liberty without due process of law.

My colleagues on the panel discern two strands in the due process jurisprudence relevant to the case before us. The first strand involves life or liberty interests that would not exist at all if not created by state or federal law in connection with the establishment of a procedure such as the one at issue here. The second strand involves "life" and "liberty" in the ordinary sense of those terms -- *i.e.*, life and liberty interests

that are independent of any state procedure.

As to the first strand, Judge Moore's lead opinion concludes (relying in part upon *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981)) that Mr. Woodard has no constitutionally protected life or liberty interest in Ohio's clemency procedure itself. This conclusion is clearly correct, in my view.

As to the second strand, the lead opinion suggests (with Judge Merritt fully concurring) that the Sate of Ohio has made its clemency procedure "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956), as quoted in *Evitts v. Lucey*, 469 U.S. 387, 393 (1985). The court concludes from this that Ohio's clemency procedure must be subjected to the same type of due process scrutiny applicable to every other stage of the adjudicatory process. I have difficulty reconciling this conclusion with what the Supreme Court did in *Dumschat*.

The plaintiff in *Dumschat* was a convicted murderer serving a life sentence in the Connecticut prison system. He had repeatedly applied to the Connecticut Board of Pardons for commutation of his sentence, and the Board had rejected each application without explanation. Mr. Dumschat brought a civil rights suit requesting the federal courts to declare that the board had violated his due process rights in denying his applications without giving any reasons for doing so. The Supreme Court refused to entertain this request, finding no constitutional liberty interest that could trigger due process protection.

It is true that the Court's opinion in *Dumschat* -- an opinion delivered by Chief Justice Burger -- dealt largely with the question whether Connecticut itself had created a federally

protected liberty interest. My colleagues' taxonomy places this sort of question in the first strand of due process jurisprudence, not the second strand. But it cannot be supposed that the *Dumschat* Court simply overlooked the second strand. Every member of the Court obviously knew that, as Justice Stevens explicitly said in dissent, the liberty protected by the Constitution "is not merely 'a statutory creation of the State.'" *Dumschat*, 452 U.S. at 469 (Stevens, J., dissenting), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Both strands of due process jurisprudence were unquestionably implicated by the facts presented in *Dumschat*.

Justice Stevens would have dealt with the second strand in much the same way that my colleagues have done here. As Justice Stevens saw it, the decision to grant or withhold commutation of the prisoner's sentence in *Dumschat* constituted "a regular and critical component of the decisionmaking process employed by the State of Connecticut to determine the magnitude of its deprivation of the prisoner's liberty." *Id.* at 471 (footnote omitted). "In my opinion," Justice Stevens continued, "the Due Process Clause applies to each step [including the step at which clemency is granted or withheld' and denies the State the power to act arbitrarily." *Id.* (footnote omitted).

I can readily appreciate the logic of Justice Stevens' dissent, just as I can appreciate the logic of my colleagues' apparent wish that the dissent had been the majority opinion. But there are many cases where, as the old saying has it, "a page of history is worth a volume of logic" -- and it is history and tradition, I take it, on which the majority of the Supreme Court relied in declining to follow the course urged by Justice Stevens in *Dumschat*. "[P]ardon and commutation decisions," as Chief Justice Burger said for the majority, "have not traditionally been the business of courts; as such,

they are rarely, if ever, appropriate subjects for judicial review." *Dumschat*, 452 U.S. at 464, citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (footnote omitted).

Evitts v. Lucey, decided four years after *Dumschat*, did not purport to overrule that case -- and *Evitts* did not involve anything remotely resembling a pardon or commutation decision. The question presented in *Evitts*, rather, was whether the Due Process Clause guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. The Court answered this question in the affirmative, notwithstanding the absence of a constitutional requirement for any right of appeal at all. If a state elects to create an appellate procedure as an integral part of its adjudicatory process, the *Evitts* Court reasoned, the procedure must meet the demands of the Due Process Clause.

It may be true, as my colleague s suggest, that the same reasoning logically applies to any and all proceedings made available by the government beyond the first appeal as of right. But the Supreme Court has sometimes been dubious about the wisdom of pushing the logic of its decisions to the extreme. To do so can produce unintended consequences in the real world, for one thing,[2] to say nothing of creating

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[2]In *Sandin v. Conner*, 115 S.Ct. 2293 (1995), for example, the Court pointed out that *Hewitt v. Helmsi, 459 U.S. 460 (1983), had pushed the logic of Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), to a point that had "create[d] disincentives for States to codify prison management procedures in the interest of uniform treatment." *Sandin*, 115 S.Ct. at 2299. Our disposition of the case at bar, similarly, could create disincentives for the State of Ohio to offer clemency petitioners an opportunity to have a personal interview with representatives of the parole board.

hopeless doctrinal conflicts. *Evitts* itself points out, citing *Ross v. Moffitt*, 417 U.S. 600 (1974), that the constitutional right to counsel is limited to the first appeal as of right and does not extend as far as habeas corpus proceedings. *Evitts*, 469 U.S. at 394. Yet habeas proceedings, I should have thought, form an integral part of the adjudicative system much more clearly than executive clemency proceedings do.

Acknowledging the "great distance" that lies between the trial and appeal stage, on the one hand, and the executive clemency stage on the other, my colleagues suggest that the due process protections mandated at the clemency stage "will necessarily be minimal, perhaps even barely perceptible. . . ." But once the camel's nose is under the tent, I suspect that it may prove difficult to keep the rest of the animal out. And if it really is true that clemency proceedings are to be constitutionalized only to a degree that is barely perceptible, perhaps this in itself casts doubt on the justification for constitutionalizing such proceedings in the first place. No other federal court has done so, as far as I am aware -- and generally speaking, at least, we have it on the highest authority that judicial review of clemency proceedings is simply not "appropriate." *Dumschat*, 452 U.S. at 464.

III

Part III of the lead opinion, as to which Judge Merritt has concurred in result but not in all of the language and reasoning, addresses Mr. Woodard's argument that Ohio's clemency procedure presents death row inmates with a "Hobson's choice" between participating in the procedure, on the one hand, and asserting a Fifth Amendment privilege against self-incrimination on the other hand. Noting that the argument "raises the specter of any unconstitutional condition," and suggesting that there may be no "compelling state interest in requiring waiver of Fifth Amendment rights

by clemency interviewees," the opinion concludes that, absent any such state interest, "Woodard has raised a colorable unconstitutional conditions claim" that necessitates a remand of the case.

With respect, I disagree. Mr. Woodard has not raised a colorable unconstitutional conditions claim, in my view; the concerns he raises strike me as far too spectral, at this point, to warrant intervention by a federal court.

The Fifth Amendment, as applied to the states by the Fourteenth Amendment, says that "[no person] shall be compelled in any criminal case to be a witness against himself. . . . " Mr. Woodard, who is represented by able counsel, is surely not unaware of this provision. And if Mr. Woodard should choose to exercise the option of speaking privately to representatives of the board that will issue a recommendation on relief from the death sentence, I am aware of no reason at all to suppose that he could be "compelled" to say anything that might be offered against him in a different criminal case or in a new trial for the murder of which he currently stands convicted.

Ohio's clemency procedures, as I read them, do not empower the parole board or its representatives to compel a prisoner who requests a personal interview to answer a single question -- or, having answered some questions, to answer others that may be asked. On its face, the challenged regulation simply does not require a waiver of the Fifth Amendment right against self-incrimination; as far as the regulation discloses, a prisoner who requests a clemency interview remains free to say as much or as little at the

interview as he wishes.[3]

It is conceivable, of course, that a prisoner who requests a personal interview could volunteer something that might tend to incriminate him. It is conceivable that evidence of what the prisoner volunteered could later be offered against him in an Ohio court. And it is conceivable that the Ohio court could rule such evidence admissible, just as it is conceivable that such a ruling could be upheld on appeal. But I think it would be "premature," to borrow the adjective used by the United States Supreme Court in *Baxter v. Palmigiano*, 425 U.S. 308, 324 (1976), for a federal court to instruct Ohio on how to deal with situations that may never materialize at all and the facts of which can only be imagined at this point.

What is it, precisely — besides writing a longer opinion — that the district court is supposed to do with this case on remand? We are told that district court should "analyze Woodard's specific arguments under *Evitts*" and the principles outlined in Part II of this court's opinion, but Part II itself would seem to have accomplished much of this task already. Perhaps the district court is to hold an evidentiary

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[3]Acknowledging that "we cannot be certain that the defendants would actually impose" a waiver requirement, the lead opinion suggests that for present purposes we must accept the allegations of the plaintiff's complaint as true. But the complaint merely pleads, in conclusory form, that "Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his Fifth . . . and Fourteenth Amendment rights against self-incrimination. . . ." The pleading of a legal conclusion such as this does not foreclose us from making our own assessment of the law in light of all well pleaded facts. The regulation containing the Ohio Death Penalty Clemency Procedure is properly before us, I believe, but speculation as to matters not addressed in the regulation can hardly qualify as a well-pleaded fact.

hearing to determine what percentage of prisoners granted clemency have taken advantage of the interview option. *Dumschat*, however, seems to suggest that this datum would be irrelevant. See 452 U.S. at 465. In any event, we are told that the district court should "determine more fully the nature of the APA's clemency procedures," consider whether the clemency interview procedure "might" impose an unconstitutional condition, and decide whether Mr. Woodard will "risk" self-incrimination if he participates in an interview. The assessment of such a risk *ex ante* will be a highly theoretical undertaking, it seems fair to say, and I seriously question its utility.

Mr. Woodard tells us in his complaint that he "does *not* contemplate that this action will have any effect on his state convictions and/or sentences (including his death sentence). . . ." (Emphasis in original.) If there is theoretical risk of self-incrimination here, it is a risk relating to criminal proceedings that have not yet been initiated and may never be initiated. In this respect, it seems to me, the case at bar is precisely analogous to *Baxter v. Palmigiano*. And just as the relief granted by the lower courts in *Baxter* was held to be "premature" (at least insofar as it was not flatly inconsistent with *Wolff v. McDonnell*), I think it is premature for us to require the district court to consider granting relief against a risk of self-incrimination that is purely academic at this point.

I would affirm the judgment of the district court across the board.

DATE: September 8, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,

Plaintiff,

v. Case No. C-2-94-892

OHIO ADULT PAROLE AUTHORITY, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court on objections made by Plaintiff Eugene Woodard to the Report and Recommendation of the Magistrate Judge concluding that the Defendants' motion for judgment on the pleadings should be granted. Because of Plaintiff's objections, this Court reviews the record *de novo*.

Plaintiff's first objection is that the Death Penalty Clemency Procedure of the State of Ohio did not adequately protect his interests under the Due Process Clause of the Fourteenth Amendment. Second, Plaintiff objects to the Magistrate Judge's conclusions that the Fifth, Sixth, Eighth and Ninth Amendments were not violated by the procedure.

This Court reaches the same conclusion as the Magistrate Judge, namely that Plaintiff did not merit due process protection because he did not have a protectable

interest at stake in the Clemency Procedure. In *Sweeton v. Brown*, 27 F.3d 1162, 1165-66 (1994), the Sixth Circuit *en banc* addressed a similar issue and held that inmates have no protected liberty interest in parole procedures where the decisions made under those procedures were wholly discretionary. *See also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (no due process interest for prisoners transferred between states where transfers were discretionary). This reasoning is persuasive here. As the Magistrate Judge found, the statutes and procedures used by the State of Ohio to review death penalty cases do not create a right to clemency; instead, the Governor, as the ultimate decisionmaker, retains almost complete discretion over whether to grant clemency. Therefore, there prisoners have no entitlement to clemency, and no procedural due process interest in clemency. The Court also agrees with the Magistrate Judge that the right to a clemency hearing is not implicit in the concept of ordered liberty and therefore does not give rise to substantive due process protection.

The Court finds the Magistrate Judge's resolution of Plaintiff's other objections dealing with his constitutional rights to be proper under these facts.

Upon consideration and being duly advised, and for the reasons enumerated above, the Court ADOPTS the Report and Recommendation of the Magistrate Judge and incorporates its conclusions of fact and law by reference. The Court GRANTS Defendants' motion for judgment on the pleadings and DENIES Defendants' motion for a stay or discovery as moot. This case is terminated.

IT IS SO ORDERED.

/s/ Joseph P. Kinneary
UNITED STATES DISTRICT JUDGE

DATE: July 20, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Eugene Woodard,	:	
Plaintiff,	:	
v.	:	Case No. C2-94-892
Ohio Adult Parole Authority, et al.,	:	JUDGE KINNEARY
Defendants.	:	

REPORT AND RECOMMENDATION

Eugene Woodard, a state prisoner under sentence of death, filed this 42 U.S.C. §1983 action on September 14, 1994. He named as defendants the Ohio Adult Parole Authority ("OAPA"), the Parole Board, and each member of the OAPA or Board in his or her official and individual capacities. The gist of this case is Woodard's claim that his constitutional rights have been or may be violated by the clemency procedures employed by the State of Ohio.

Defendants filed a motion for judgment on the pleadings on January 9, 1995 and moved to stay discovery. Woodard has opposed both motions. The dispositive motion was referred to the undersigned for the issuance of a Report and Recommendation. For the following reasons, it is recommended that the motion for judgment on the pleadings

be granted and the motion to stay discovery be denied as moot.

I.

A motion for a judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is governed by the same standard as a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Abbott Laboratories v. NutraMax Products*, 844 F. Supp. 443 (N.D. Ill. 1994). Therefore, a court must accept all factual allegations in the complaint as true and should grant the motion only when the movant is entitled to judgment as a matter of law. *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663 (N.D. Ohio 1992). All reasonable inferences must be drawn in favor of the nonmoving party. *Id.* A court may not dismiss the action unless it is convinced that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. "*Bloor v. Carro, Spanbock, Londin, Rodman, & Fass*, 754 F.2d 57 (2d Cir. 1985)." It is against this standard that the instant motion must be evaluated.

II.

Woodard has exhausted all of the direct appeals of his criminal conviction, including an appeal to the United States Supreme Court, which denied certiorari. The Ohio Supreme Court issued a stay of execution on August 24, 1994 so that Woodard could pursue post-conviction relief.

The facts surrounding Woodard's cause of action, as set forth in his complaint, follow. On September 6, 1994, Woodard's counsel learned that a clemency hearing was scheduled for September 16, 1994 and that the OAPA would interview Woodard on September 9, 1994 at the Southern Ohio Correctional Facility ("SOCF"). This hearing and

interview were to be conducted according to the new Death Penalty Clemency Procedure ("Clemency Procedure"), as adopted by the OAPA. Because neither Woodard nor his counsel had filed a petition for clemency and because Woodard believed the Clemency Procedure was constitutionally infirm, his counsel sent a letter to the OAPA objecting to the clemency hearing and interview, requesting the right to be present for all interviews and hearings, and requesting a continuance of the proceedings on the basis that a stay of execution was in effect. Because counsel had only recently been appointed, he also argued that he could not effectively represent Woodard's interests in the clemency hearing. Finally, counsel for Woodard argued more information and investigation were necessary for a proper and thorough clemency review. The OAPA failed to respond to these requests. The OAPA did not meet or talk with Woodard or his counsel on September 9, 1994, although all parties were present at the SOCF at the same time.

Woodard alleges that if the OAPA conducts its clemency hearing in accordance with the Clemency Procedure, he will be precluded from requesting additional clemency proceedings without leave of OAPA. In addition, because Woodard is currently engaged in ongoing litigation regarding his conviction and sentence, he argues that the defendants, who are agents, representatives, and agencies of the State of Ohio, cannot require Woodard to discuss his case without the presence of counsel. Woodard asserts that he will be permanently deprived of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights to be free from self-incrimination, to have effective assistance of counsel, to be free from cruel and unusual punishment, to have the equal protection of the law, and to have substantive and procedural due process.

Woodard requested a declaration that the policy of the

OAPA is unconstitutional; a preliminary injunction providing that the defendants may not interview Woodard without the consent and presence of counsel; a preliminary injunction providing that the defendants may not conduct a clemency hearing in regard to Woodard until such time as the plaintiff petitions for such a hearing or, in the alternative, until such time as there is a thorough investigation; an order enjoining the defendants from applying the clemency procedure to Woodard; an order that plaintiff be awarded costs and attorneys' fees; and an order awarding to the plaintiff other such relief as the Court may deem just and proper.

On September 16, 1994, District Court Judge Joseph P. Kinneary signed a consent decree which indefinitely postponed the clemency hearing scheduled for Woodard on September 16, 1994. Pursuant to the order, no clemency hearings or clemency interviews regarding Woodard are to be held without 30 days notice to the Court, counsel for Woodard, and Woodard.

III.

A. *Statutory and Regulatory Framework*

The Ohio Constitution reposes the power of clemency in the Governor. Article III, Section 11 of the Ohio Constitution provides that "he shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and defenses, except treason and cases of impeachment, upon such conditions as he may think proper. . . ."

O.R.C. §2967.03 grants to the OAPA the power to "exercise its functions and duties in relation to the pardon, commutation, or reprieve of a convict upon direction of the governor or upon its own initiative. . . ." Further, the "authority may recommend to the governor the pardon,

commutation, or reprieve of sentence of any convict or prisoner, . . . , if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, . . . such action would further the interests of justice and be consistent with the welfare and security of society." O.R.C. §2967.03. Applications for executive pardon, commutation, or reprieve are addressed in O.R.C. §2967.07:

> All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with a recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefore and the records or minutes relating to the case.

O.A.C. §5120:1-1-15 governs the handling of applications for pardon, reprieve, or commutation by the OAPA. All applications for clemency must be made in writing to the Chief of the OAPA. When an application is filed with the OAPA, it is required to conduct "such investigation as is necessary" and to make a recommendation to the Governor. Hearings are held at the discretion of the Parole Board. In the event that the Parole Board recommends for or against clemency, such recommendation is forwarded to the Governor, together with a brief statement of the facts, the ground for such recommendation, and the record or minutes of the case. The decision of the Parole

Board to recommend for or against clemency is within its sole discretion and is not subject to administrative review. If the OAPA receives an application for clemency for a person for whom clemency was denied less than two years earlier and the OAPA does not believe that the application contains any grounds that were not or could not have presented in the earlier application, "the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial." In such a case, the OAPA need conduct no further hearing or investigation unless specifically requested by the Governor. Finally, O.A.C. §5120:1-1-15 provides that the OAPA shall consider a case for pardon or commutation only upon the application of the convicted person or his counsel or at the direction of the Governor.

The Clemency Procedure at issue became effective on July 21, 1994. The stated purpose of the Clemency Procedure is "to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed." According to the clemency procedure, a copy of the procedure must be given to all death row inmates. When an inmate's direct appeals are exhausted and an execution date has been fixed, a copy of such decision is forwarded to the Parole Board. Upon receipt of the notice that direct appeals are exhausted and an execution date has been fixed, or upon its own initiative, the Parole Board requests an investigation into the details of the prisoner's offense, prior record, and other relevant information. Forty-five days before the execution date, the Parole Board schedules a clemency review, unless the execution date is stayed. This review should be conducted approximately 21 days before the execution date. Notice of the clemency review is sent to the sentencing court, the prosecutor, and the victim's family or representative. A notice is also sent to the prisoner advising

that he or she may be interviewed and make statements which will be considered by the Parole Board. A copy of this notice must be sent to the Public Defender or other counsel for the prisoner. Finally, once the clemency review hearing has been completed, a recommendation to the Governor is made.

If the prisoner requested a personal interview, the Parole Board Chairperson appoints one or more members of the Board or Hearing Officers to interview the prisoner. Only the prisoner and the person or persons assigned to conduct the interview are allowed to be present. Only the Parole Board and individuals that attended the interview may attend the Clemency hearing. Attendance of others is at the discretion of the Parole Board Chairperson. At the hearing, the Parole Board considers all relevant information and its decision is communicated to the Chief Legal Counsel for the Governor. The Parole Board also notifies the prisoner and his or her counsel, the prosecutor, the victim's family or representative, and the Attorney General of its recommendation. Finally, the Parole Board prepares a press release. If new information comes to light which was not considered in its initial recommendation, or if the Parole Board receives a subsequent petition on behalf of the prisoner, the Parole Board may supplement its initial decision and recommendation.

B. *Due Process Claim*

Before procedural due process protections are triggered, an underlying liberty or property right must exist that is created by the Federal Constitution or by state law. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). However, there is no "constitutional or inherent right" to clemency. *Dumschat, supra*, at 464. Thus, the basis for any constitutional claim in the instant case must be

"found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Id.* at 465. "[A] state creates a protected . . . interest by placing substantive limitations on official discretion. An inmate must show 'that particularized standards or criteria guide the state's decisionmakers.'" *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (quoting *Dumschat, supra*, at 467 (Brennan, J., concurring)). If "the decisionmaker can deny the requested relief for any constitutionally permissible reason or for no reason at all," the state has not created a constitutionally protected interest. *Dumschat, supra*, at 467 (Brennan, J., concurring).

In Ohio, the Governor enjoys almost unfettered discretion in determining whether to grant or to deny clemency. *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 644 N.E.2d 369, 373-74 (1994), *reconsideration denied sub nom., Wilkinson v. Maurer*, 71 Ohio St. 3d 1462, 644 N.E.2d 1385 (1995). The only restrictions on a Governor's clemency power are those authorized by the Ohio Constitution. *Id.*, 644 N.E. 2d at 373. Those constitutional restrictions provide that clemency may be granted only after conviction, may be granted only partially in cases of treason, and may not be granted at all in cases of impeachment. *Id.*; Ohio Constitution, Art. III, §11. In addition, the legislature cannot prescribe substantive regulations on the Governor's discretion in the use of clemency power or in any way intrude on the Governor's discretion. *Id.* at 374-75. Therefore, only regulations created by the Executive Branch of the Ohio government which intrude on the discretion of the Governor to use the clemency power could give rise to a state-created right which is protected by the Due Process Clause of the United States Constitution.

The Clemency Procedure at issue in the instant case is analogous to the challenged prison regulations in *Olim*,

supra. In *Olim*, the Court held that limitations on the procedures to be followed by a purely advisory committee did not invoke due process protections where the ultimate decisionmaker's discretion remained free. 461 U.S. at 249-50. Here, the challenged Clemency Procedure does not attempt to limit the Governor's discretion. The Clemency Procedure merely prescribes a method by which the OAPA, an advisory committee with respect to clemency, prepares itself to report to the Governor in cases where no application for clemency has been filed. The only mandatory language contained in the Clemency Procedure applies to the OAPA, an authority empowered to make only non-binding recommendations regarding clemency.

The Clemency Procedure does not dictate to the Governor what he or she must do with the recommendation and nothing prevents the Governor from investigating, holding a hearing, or proceeding in any manner as the Governor chooses. The challenged procedure imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Governor, the official who holds the clemency power and the discretion in its use. Therefore, the Governor's ability to wield the clemency power is not infringed by the Clemency Procedure because that official is not hampered by "particularized standards or criteria." Thus, no right to clemency has been created by the state and procedural due process protections are not triggered. In Ohio, clemency is a power held by the Governor; it is not a right held by a person who has been lawfully convicted.

Woodard fails to raise a substantive due process claim because there is no right to clemency which is so vital that "neither liberty nor justice would exist if [it] were sacrificed." *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986) (citations omitted.).

C. *Other Constitutional Claims*

Woodard also argues that his Fifth, Sixth, Eighth, and Ninth Amendments rights, made applicable to the states through the Fourteenth Amendment, have been or will be violated if the Clemency Procedure is followed. The undersigned recommends the Court find, to the extent these claims were raised, that they lack merit. The Fifth Amendment right against self-incrimination is not implicated when the decision to communicate is completely voluntary and the state does not seek to deprive a person of another protected right for refusal to communicate. *See Simmons v. United States*, 390 U.S. 377, 389-94 (1968). Further, the Sixth Amendment right to counsel extends only through the first appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Pennsylvania v. Finley*, 481 U.S. 551 (1990); *Coleman v. Thompson*, 111 S.Ct. 2546 (1991). Clemency procedures are unrelated to the first appeal as of right or to other, earlier, critical stages of the criminal prosecution. Finally, because clemency or its denial is not an imposition of punishment, the Eighth Amendment right to be free from cruel and unusual punishment is not at issue. *See Herrera v. Collins*, 113 S.Ct. 853, 867 (1993).

D. *Motion to Stay Discovery*

Defendants move to stay discovery when they filed their dispositive motion. They did provide plaintiff with all past versions of the clemency procedures, however, and advised plaintiff that there were no other relevant written policies that were responsive to plaintiff's discovery requests. They declined, however, to identify each person who is or was involved in reviewing clemency applications or to provide copies of reports or recommendations relating to other death sentenced individuals. The Court does not believe that any of the documents requested but not produced

would have any bearing on the threshold question of whether the due process clause applies to the clemency procedure in Ohio. Therefore, it will be recommended that if this Report and Recommendation is adopted, the motion relating to discovery be dismissed as moot.

IV.

For the foregoing reasons, the undersigned recommends that the defendant's motion for judgment on the pleadings be granted because the plaintiff can prove no set of facts which would entitle him to relief and the defendants are entitled to judgment as a matter of law. Further, it is recommended that if the Report and Recommendation is adopted, the defendants' motion to stay discovery be dismissed as moot.

V. *PROCEDURE ON OBJECTIONS*

If any party objects to this Report and Recommendation, that party may, within ten (10) days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. Section 636(b)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a

waiver of the right to have the district judge review the Report and Recommendation *de novo*, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Terence P. Kemp
United States Magistrate Judge

(3)

Supreme Court, U.S.
FILED
APR 3 1997
OFFICE OF THE CLERK

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

PETITIONERS,

-vs-

EUGENE WOODARD,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Eugene Woodard, through undersigned counsel, respectfully requests leave to file his brief in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent is represented by the Office of the Ohio Public Defender in post-conviction proceedings in the State courts. Respondent is proceeding *in forma pauperis* during his post-conviction appeals.

87 pp

Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

DAVID H. BODIKER - 0016590
Ohio Public Defender

MICHAEL J. BENZA - 0061454
Assistant State Public Defender
Counsel of Record

RICHARD J. VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

Office of the Ohio Public Defender
8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.

PETITIONER,

-vs-

EUGENE WOODARD,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

AFFIDAVIT OF INDIGENCY

I, EUGENE WOODARD, being first duly sworn, depose and say that in support of my Brief in Opposition to Petition for a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of petitioning for a Writ of Certiorari are true.

1. Are you presently employed? Yes

A. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. 16.00/MONTH · MANSFIELD CORRECTIONAL INSTITUTION

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. —

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? No

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. —

3. Do you own any cash or checking or savings account? _____

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? No

A. If the answer is yes, describe the property and state its approximate value.

—

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Eugene Woodard
EUGENE WOODARD

Duly witnessed and sworn before me, a Notary Public, this 27th day of May, 1997.

NOTARY PUBLIC
MICHAEL JOHN BENZA
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

-vs-

EUGENE WOODARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT WOODARD'S BRIEF IN OPPOSITION

DAVID H. BODIKER - 0016590
Ohio Public Defender

RICHARD VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

MICHAEL BENZA - 0061454
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT

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Herrera v. Collins, 506 U.S. 390 (1993)	2, 3, 4, 6
Herring v. New York, 422 U.S. 853 (1975)	3
Lefkowitz v. Turley, 414 U.S. 70 (1973)	7
Morrissey v. Brewer, 408 U.S. 471 (1972)	4
Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178 (6th Cir. 1997)	2, 3, 4, 5, 6, 7
CONSTITUTIONAL PROVISIONS:	
U.S. Const., amend. V	5, 6, 7
U.S. Const., amend. VIII	3
U.S. Const., amend. XIV	3
Ohio Const. art. III, Sec. 11	3
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Ohio Rev. Code Ann. Sec. 2967.07	3
OTHER AUTHORITIES:	
Ohio Death Penalty Clemency Procedure	2, 3, 4, 5, 6
The Federalist Papers, No. 74, at 341 (Hallowell ed. 1842)	2

CAPITAL CASE

QUESTIONS PRESENTED

I. **WHETHER OHIO'S DEATH PENALTY EXECUTIVE CLEMENCY PROCEDURES ARE INTEGRAL IN THE CRIMINAL JUSTICE SYSTEM AND IMPLICATES THE DUE PROCESS PROVISIONS UNDER EVITTS V. LUCEY, 469 U.S. 387 (1985)?**

II. **DOES OHIO'S DEATH PENALTY CLEMENCY PROCEDURE IMPOSE AN UNCONSTITUTIONAL CONDITION ON AN INMATE'S FIFTH AND FOURTEENTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION BY INITIATING A CLEMENCY REVIEW WHILE THE INMATE IS SEEKING POST-CONVICTION RELIEF?**

STATEMENT OF THE CASE

Respondent generally accepts Petitioners' characterization of the statement of the case. Petitioners' factual inaccuracies pertaining to the crime for which Mr. Woodard was convicted and sentenced are irrelevant to the issue before the Court. There are however some omissions that must be addressed.

On July 18, 1994, the Ohio Supreme Court set Mr. Woodard's execution date for October 7, 1994.

On August 16, 1994, Mr. Woodard applied for a stay of execution to pursue state post-conviction proceedings.

On August 24, 1994, forty-five days before Mr. Woodard's scheduled execution, the Ohio Supreme Court issued a stay of execution as a matter of right.

On September 6, 1994, Petitioners informally notified counsel for Mr. Woodard that the clemency interview of Mr. Woodard was scheduled for September 9, 1994 and that the clemency hearing was scheduled for September 16, 1994. Attempts by counsel for Mr. Woodard to participate in the clemency process were met with silence from Petitioners.

REASONS WHY THE PETITION SHOULD BE DENIED

I. **EXECUTIVE CLEMENCY IS INTEGRAL IN THE CRIMINAL JUSTICE SYSTEM AND THE DEATH PENALTY SCHEME AND IMPLICATES AN INMATE'S DUE PROCESS RIGHTS UNDER *EVITTS*.**

Contrary to Petitioners' claim that this issue should be immediately reviewed, Pet. for Writ at 15, review by this Court is premature as to the ultimate issue. The Sixth Circuit simply remanded this matter for further factual development. The lower courts are better suited to

conduct this fact finding and make the initial determination of what process is due. Then, if necessary, this Court can review the matter with the benefit of a complete factual record and legal analysis. Therefore, the Petition for Writ of Certiorari should be denied.

Assuming *arguendo* that this issue is ripe for this Court's review, petitioners' argument that Evitts v. Lucey, 469 U.S. 387 (1985), is inapplicable is without merit. The Sixth Circuit did not expand concepts of due process but rather applied existing principles to the important process of death penalty clemency. If a state acts in a field that is discretionary, that act must be in accord with the Due Process Clause. Evitts, 469 U.S. at 401. In Evitts, this Court held that "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." 469 U.S. at 393; quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956). The history of executive clemency in this country demonstrates its integral role in the criminal justice system. See The Federalist Papers, No. 74, at 341 (Hallowell ed. 1842); Ex Parte Grossman, 267 U.S. 87, 120-121 (1925). Above all, a capital defendant's only avenue to raise a free standing claim of "actual innocence," after trial, is clemency. Herrera v. Collins, 506 U.S. 390, 411 (1993). Ohio's clemency procedure is an integral part of the determination of a capital defendant's culpability because it is the only opportunity to raise a claim of innocence. Moreover, Ohio's clemency process is a mandatory process conducted to ensure the Governor makes an informed decision before execution. Because of this unique situation the concepts of Evitts are applicable.

The Sixth Circuit Court of Appeals determined that the Due Process Clause is implicated in Ohio's Death Penalty Clemency Procedure (hereinafter "Clemency Procedure"). Woodard v.

Ohio Adult Parole Authority, 107 F.3d 1178 (6th Cir. 1997). The Clemency Procedure requires a mandatory recommendation and a "thorough investigation" by the Adult Parole Authority (hereinafter "APA") before the Governor makes a clemency decision. Article III, Section 11 of the Ohio Constitution; Ohio Rev. Code Ann. Sec. 2967.07 (Anderson 1994). The APA's investigation includes an uncounseled interview with the inmate (only if the inmate requests one), a hearing (neither the inmate or his counsel are permitted to attend, but the prosecutor, trial judge, and victim's family are permitted to attend), and a review of the inmate's file. Death Penalty Clemency Procedure, Sec. VI(B)(C); (Sec. VI is typed as Sec. IV Procedure). The Sixth Circuit remanded the matter to the District Court to develop the record in order to determine the amount of process that is due. Woodard, 107 F.3d at 1187. The Court recognized that the level of process due may "be minimal, perhaps even barely perceptible" but that further factual development is necessary to decide this issue. Id.

The Court based its opinion on the maxim that executive clemency is the fail safe mechanism within a system that promotes the ultimate objective that the guilty be convicted and the innocent go free. Id. at 1186-88. See also Evitts v. Lucey, 469 U.S. 387, 394, citing Herring v. New York, 422 U.S. 853, 862 (1975). A death penalty scheme without an opportunity for clemency results in a death penalty scheme that smacks of avarice, arbitrariness and caprice in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Furman v. Georgia, 408 U.S. 238 (1972). "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera, 560 U.S. at 411. In fact, every state that imposes the death penalty has a mechanism for a capital defendant to file for clemency. Id. 560 U.S. at 414;

Woodard, 107 F.3d at 1187. As clemency is an integral part of a capital scheme some level of due process protection is warranted. See Evitts, 469 U.S. 387. As the Sixth Circuit pointed out, there is a point where limitations on the procedure for making a clemency decision are so extreme that the procedure offends federal due process concerns. Woodard, 107 F.3d at 1188. In order to ensure that clemency satisfies its ultimate goal, some level of process is due. It was on this issue that the Sixth Circuit remanded the matter.

While the Governor's authority to grant clemency is discretionary, the Clemency Procedure is mandatory. In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court held that a state has the discretion in setting policies for parole determinations but those policies must be in accord with the Due Process Clause. The discretionary nature governing parole determinations and the procedures guiding the clemency application process are analogous. Parole is "an integral part of the penological system," id. 408 U.S. at 477, and clemency is integral in the finality of the criminal justice system. Herrera, 506 U.S. at 411. Parole and clemency occur after criminal prosecution and the imposition of sentence. Both are then investigated by a board with discretionary authority to make a determination. Morrissey, 408 U.S. at 478. Just as parole determinations must be guided by basic fairness to avoid arbitrariness, so must clemency determinations. See Morrissey, 408 U.S. at 484. Ohio's clemency procedure guides a discretionary function of the APA and must comport with the due process clause under Evitts.

The Due Process Clause also mandates that the procedures enacted be a meaningful ritual. Evitts, 469 U.S. at 394. As the Sixth Circuit noted, it would be a meaningless ritual if a State simply enacted "a procedure where a Governor or parole board merely pulled names out of a lottery bin or flipped coins to make clemency decisions" because it would offend federal due

process. Woodard, 107 F.3d at 1188. The Sixth Circuit remanded the case back to the District Court to develop the record to determine whether the procedure adopted by Ohio is a meaningless ritual and what level of due process is required to ensure the validity of the process.

The Sixth Circuit held that Ohio's Clemency Procedure implicates due process concerns under Evitts. However, the Court remanded this matter to develop the facts in order to determine the level of process due because the District Court is better suited to make these initial determinations. This issue is untimely before this Court and therefore, the Petition for Writ of Certiorari should be denied.

II. THE DECISION OF THE COURT BELOW THAT OHIO'S CLEMENCY PROCEDURE CREATES AN UNCONSTITUTIONAL CONDITION IS SUPPORTED BY ESTABLISHED LAW AND DOES NOT THREATEN STATE EXECUTIVE CLEMENCY DECISIONS.

The Sixth Circuit additionally remanded this case back to the District Court to determine whether Ohio's Clemency Procedure imposes an unconstitutional condition on Mr. Woodard's Fifth Amendment right to remain silent. In the case at hand, a clemency review is being forced upon a death row inmate while the inmate pursues state post-conviction relief. Ohio's Clemency Procedure does not provide the inmate with any information whether the review implicates his Fifth Amendment right against self-incrimination. The State of Ohio in the case at bar is forcing Respondent into an unconstitutional condition by implicating Respondent's Fifth Amendment right against self-incrimination. The Sixth Circuit held that Ohio's clemency procedure presents Respondent with an unconstitutional condition because Respondent has to choose which

mechanism he wants to pursue, clemency or post-conviction. Woodard, 107 F.3d at 1192-93. The Court held that "[a] coerced waiver of the privilege is particularly troubling here, where the state has arranged for the clemency review process to take place before or during Woodard's post-conviction proceedings in state court." Id. The Court went on to state that, to participate meaningfully during the clemency process, Mr. Woodard has to be open and frank with the parole board for a meaningful clemency review and waive his Fifth Amendment right against self-incrimination. Id. The Court held that the necessity to speak openly with the state is greater than in Baxter v. Palmigiano, 425 U.S. 308 (1976), because clemency decides whether the inmate "shall live or receive leniency." Id. at 1192. Ohio's clemency procedure presents an inmate with an unconstitutional condition by forcing a choice between seeking clemency and pursuing judicial remedies.

Clemency has traditionally been the last step in the death penalty scheme. As this Court has noted, clemency is the "historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Herrera, 560 U.S. at 411. In the case at hand while Mr. Woodard was, and is, pursuing his post-conviction remedies the State of Ohio initiated the clemency process. Neither the Clemency Procedure or the APA advised Respondent whether remaining silent, refusing an interview, or anything he states during the interview can be used against him in both future prosecutions and the current proceedings, thereby, forcing Respondent into an unconstitutional choice. Respondent is forced to choose between seeking clemency or post-conviction remedies. This unconstitutional choice offends the death penalty scheme and the Fifth Amendment of the Constitution of the United States.

The State's argument that Baxter v. Palmigiano, 425 U.S. 308 (1976), is applicable to this case is without merit. Baxter involved a prison disciplinary hearing on a matter totally unrelated to the criminal charges and convictions that landed Palmigiano in prison. On the other hand, the clemency interview at issue in this case presumably will directly address the charges and convictions that resulted in Mr. Woodard's death sentence. As Mr. Woodard continues to challenge both the convictions and sentences, the State's failure to grant immunity or other Fifth Amendment protections violates Mr. Woodard's constitutional rights. See Baxter, 425 U.S. at 316-317, 318; Lefkowitz v. Turley, 414 U.S. 70, 85 (1973).

The Sixth Circuit remanded this issue to the District Court to develop the record as to what occurs during a clemency review. On the current state of the record there is no evidence what the State asks an inmate about or what the State does with any statements given by an inmate. Depending on what the State intends to do with the information, Mr. Woodard is forced into an unconstitutional condition during his clemency review. Woodard, 107 F.3d at 1189, n. 4. The District Court is better suited to determine whether Ohio's Clemency Procedure creates an unconstitutional condition on the Respondent. Therefore, the Petition for Writ of Certiorari should be denied as being untimely for this Court to consider at this time.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

DAVID H. BODIKER - 0016590
Ohio Public Defender

RICHARD VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

MICHAEL BENZA - 0061454
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT
EUGENE WOODARD

48474/11#$01! doc/mjb

No. 96-1769

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

-vs-

EUGENE WOODARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S APPENDIX

DAVID H. BODIKER - 0016590
Ohio Public Defender

RICHARD VICKERS - 0032997
Post-Conviction Supervisor,
Death Penalty Division

MICHAEL BENZA - 0061454
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR RESPONDENT

US CONST AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

US CONST AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE III. EXECUTIVE

Current through End of 1996 portion of 121st General Assembly

O CONST III § 11 GOVERNOR HAS POWER OF EXECUTIVE CLEMENCY; LIMITATIONS

The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The governor shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the governor's reasons therefor.

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXIX. CRIMES--PROCEDURE
CHAPTER 2967. PARDON; PAROLE; PROBATION

Current through End of 1996 portion of 121st General Assembly

OH ST. Sec. 2967.07 APPLICATION FOR EXECUTIVE PARDON, COMMUTATION, OR REPRIEVE

All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes relating to the case.

EXHIBIT A
STATE OF OHIO

DEPARTMENT OF REHABILITATION AND CORRECTION

SUBJECT: DEATH PENALTY CLEMENCY PROCEDURE	PAGE 1 OF 4
RULE/CODE REFERENCE: ORC 2967.03, 2967.04, 2967.06, 2967.07, 2967.12	SECTION: 501 NUMBER: 09
RELATED ACA STANDARDS: 2-1011	SUPERCEDES: N/A
RELATED AUDIT STANDARDS: N/A	EFFECTIVE DATE: July 21, 1994
	APPROVED: Reginald A. Wilkinson

I. AUTHORITY

This policy is issued in compliance with Ohio Revised Code §120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. PURPOSE

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. APPLICABILITY

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing them.

IV. DEFINITIONS

None.

V. POLICY

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

IV. PROCEDURE

A. Notification to all condemned inmates of this policy.

1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death shall be given a copy of this policy.

BEST AVAILABLE COPY

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.

2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.

3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximatly twenty-one days prior to the scheduled execution date. The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.

4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him

that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a psychological or psychiatric evaluation as determined appropriate by the Parole Board.

2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by the parole board chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.

2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.

3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.

2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.

Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.

3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of the condemned prisoner, the Parole Board may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

BEST AVAILABLE COPY

No. 96-1769

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OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

-vs-

EUGENE WOODARD,

Respondent.

CERTIFICATE OF SERVICE

I, Michael J. Benza, a member of the Bar of this Court, hereby certify that on this 3rd day of June, 1997, a copy of the foregoing RESPONDENT WOODARD'S BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, and AFFIDAVIT OF INDIGENCY wás deposited in a United States Mail Box, first class postage prepaid, pursuant to Rule 29.3, to Betty Montgomery, Attorney General, Jeffrey S. Sutton, State Solicitor, Simon B. Karas, Deputy Chief Counsel and Jon C. Walden, Assistant Attorney General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215-3428. I further certify that all parties requiring to be served have been served.

MICHAEL J. BENZA - 0061454
Assistant State Public Defender
Counsel of Record

COUNSEL FOR RESPONDENT

Supreme Court, U.S.
FILED
JUN 9 1997
OFFICE OF THE CLERK

No. 96-1769

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

BETTY D. MONTGOMERY
Attorney General

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

REPLY BRIEF OF PETITIONERS

In failing to dispute the significance of the questions presented and the existence of a conflict among the lower courts, respondent has effectively conceded the desirability of granting the petition for a writ of certiorari. This reply therefore will principally highlight the certworthiness of each issue presented, clarify certain matters incorrectly set forth, or relied upon, in respondent's brief in opposition and show that there is no obstacle to reviewing this important case.

1. Respondent offers little explanation why the Court should not grant the first question presented -- whether the due process limitations contained in *Evitts v. Lucey*, 469 U.S. 387 (1985), extend to executive clemency decisions.

a. Conspicuously missing from respondent's brief in opposition is any disagreement with our contention that the Sixth Circuit's decision creates a lower-court conflict of authority on this point. Though several lower courts have faced similar challenges to State clemency procedures, not one of them has held that clemency constituted a part of the State's overall procedure for prosecution and punishment, requiring additional due process review and ultimately the federalization of the clemency process. *See* Petition 15-16. On the contrary, each adhered to *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), in rejecting a request to expand the due process limitations on a State's discretionary clemency procedure. *See* Petition 16.

b. Nor does respondent dispute the significance of this question. If anything, his brief illustrates the point. Anytime "a state acts in a field that is discretionary," he argues, "that act must be in accord with the Due Process Clause." Opp. Br. 2 (*citing Evitts*, 469 U.S. at 401). This theory not only makes *Dumschat* a dead letter, but also would potentially extend to other procedures, creating for example a right to counsel in post-conviction

proceedings. That the issue is national in scope, and extends well beyond the boundaries of the Sixth Circuit, is also demonstrated by the amicus brief submitted by California and twenty-eight other States asking the Court to review the issue. All told, then, thirty of the thirty-eight States with a death penalty agree that the decision below should be reviewed promptly. Their request, we respectfully submit, should be granted.

c. Respondent apparently tries to justify the denial of certiorari on the ground that the lower-court decision is correct. Opp. Br. 3-4. But the argument is not helpful and in the end inaccurate. Even if the Sixth Circuit's extension of *Evitts* to the clemency arena were correct, respondent could not -- and in fact does not -- deny that this represents an extension of *Evitts*. If accurate, all death-row inmates (indeed, all inmates generally since clemency extends to all incarceration) ought to be the beneficiaries of this new doctrine. Of course, in our view, this extension of *Evitts* is not accurate and thus respondent's merits argument cuts the other way on the certiorari question. In particular, it remains implausible that the wide discretion given the States in establishing and implementing a clemency procedure under the due process interpretation of *Dumschat* can tenably co-exist with a separate set of limitations on the same procedure under the due process interpretation of *Evitts*. One or the other case must govern the States' clemency laws, but not both.

d. Unable to dispute the significance of the question, the lower-court conflict of authority, or even the impact of the merits on the petition, respondent also argues that the case is not "ripe" for review. Opp. Br. 5. This, it should be emphasized, is respondent's only argument that the case does not represent a good vehicle for reviewing the issue. No other waiver, jurisdictional, or procedural

arguments are made on this question or even the second one presented. In truth, the procedural stance of the matter advances the desirability of using the case as a vehicle for reviewing this issue. The Sixth Circuit's holding involves a pure issue of law. It turns on whether *Dumschat* or *Evitts*, or both, govern State clemency procedures. Further factual development could not possibly aid the resolution of these competing interpretations of the case law. On the record presented, moreover, it is quite clear that the issue petitioners have raised is dispositive. The Sixth Circuit ruled that petitioners prevail as a matter of law under *Dumschat* but not under *Evitts*. A-11. The lower court record is similar. Both the magistrate and district court ruled for Ohio as a matter of law in the case. A-41, A-43. Nor is it the least bit unusual for the Court to review cases in which a final judgment has not yet been entered. *See Baker v. GMC*, No. 96-653, *cert. granted* (March 24, 1997); *Frisby v. Schultz*, 487 U.S. 474, 478 (1988);*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975). In this instance, finally, any further fact development concerning the particularities of Ohio's clemency procedure is bound simply to limit the relevance of this Court's decision to the other States. Better to review what is now a pure question of law with broad application -- are there one or two strands of due process limitations on a State's clemency procedure? -- than to narrow the issue (or worse, prohibit later review) through additional lower-court proceedings.

2. No less persuasive are respondent's suggestions as to why the second question -- did Ohio create an unconstitutional condition by permitting voluntary uncounseled interviews during the clemency process? -- should not be reviewed.

a. To begin with, it is important to emphasize what respondent does not say on this point. He does not

dispute the importance of the question. He does not dispute our contention that the Sixth Circuit decision conflicts with *Crampton v. Ohio*, 402 U.S. 183 (1971), and is in tension with *Brown v. United States*, 356 U.S. 148 (1958), and *Spencer v. Texas*, 385 U.S. 554 (1967). And he only cursorily responds to our contention that the decision below conflicts with *Baxter v. Palmigiano*, 425 U.S. 308 (1975). Nor does respondent offer any waiver or other procedural bars to reviewing the issue.

b. Respondent principally argues that the Sixth Circuit correctly extended the doctrine of unconstitutional conditions to the clemency setting. Opp. Br. 5-6. He is incorrect. Prior to the recent amendments to Ohio's clemency procedure, no inmate (whether death-row or not) was guaranteed an interview. Such interviews were, and long had been, discretionary. In expanding the availability of clemency interviews to all who sought them, Ohio was of course extending the number of ways in which inmates could seek mercy from the Governor. In doing so, however, Ohio did not want to create still another layer of legal review of a criminal sentence. In the State's view, the greater right to eliminate interviews altogether in reviewing clemency applications included the lesser right simply to offer voluntary uncounseled interviews.

Nor does an inmate face any unfair predicament that the interview will be used against him if the clemency process starts before his federal habeas petition has been completed. As an initial matter, that is so because clemency review does not even start unless the inmate chooses (as Mr. Woodard did here) to delay the filing of his stay motion. But, even in that situation, he is not prejudiced. He can always file a later clemency application (after direct review) and seek an interview at that point in time if he desires. Neither the facts nor the law, in short, warrant an extension

of the doctrine of unconstitutional conditions to the clemency setting.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, we respectfully submit that the writ should be granted.

Respectfully Submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

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No. 96-1769

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioner,

v.

EUGENE WOODARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, KENTUCKY, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, WASHINGTON AND WYOMING IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WARD A. CAMPBELL
Deputy Attorney General
WILLIAM G. PRAHL *
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5262
Fax: (916) 324-2960
* Counsel for Amici Curiae
[Additional Counsel Listed on Inside Page]

29 pp

BILL PRYOR
Attorney General
State of Alabama

GRANT WOODS
Attorney General
State of Arizona

WINSTON BRYANT
Attorney General
State of Arkansas

GALE A. NORTON
Attorney General
State of Colorado

JOHN M. BAILEY
Attorney General
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

MARGARET S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

ALBERT B. CHANDLER, III
Attorney General
Commonwealth of
Kentucky

RICHARD P. IEYOUB
Attorney General
State of Louisiana

ANDREW KETTERER
Attorney General
State of Maine

MIKE MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

PETER VERNIERO
Attorney General
State of New Jersey

MICHAEL F. BEASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

D. MICHAEL FISHER
Attorney General
Commonwealth of
Pennsylvania

CHARLES M. CONDON
Attorney General
South Carolina

MARK BARNETT
Attorney General
State of South Dakota

CHARLES W. BURSON
Attorney General
State of Tennessee

DAN MORALES
Attorney General
State of Texas

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

WILLIAM U. HILL
Attorney General
State of Wyoming

(CAPITAL CASE)

QUESTION PRESENTED

1. Whether state clemency procedures may be reviewed under the due process limitations on a state's overall scheme of adjudication of crimes and punishment established by *Evitts v. Lucey*, 469 U.S. 387 (1985), or whether *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981) contains the sole due process limitations on those procedures.

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INTEREST OF *AMICI CURIAE* STATES

Amici curiae are the legal representatives of their states' executives and of the People in their states' postconviction litigation. The states have a weighty interest in the finality and enforcement of their state criminal judgments. This interest embraces concerns about the proliferation of postconviction claims and levels of federal judicial review.

Amici have a significant interest in this particular case since the *Woodard* court's opinion initiates an intrusive new level of federal judicial review into an area that has historically and exclusively been the domain of the state executive, clemency. Furthermore, the opinion applies a heretofore unknown due process analysis to a state's post conviction procedures.

Every state has vested virtually unfettered clemency powers in their executive branches. *See, e.g. Herrera v. Collins*, 506 U.S. 390, 414 fn. 14 (1993). The historic role of clemency as a non-judicial executive function for extending mercy to deserving claimants is threatened by the imposition of inadvisable and unspecified proceduralism with inevitable judicial review. Amici are concerned that the *Woodard* opinion will have a burdensome nationwide impact on the states' ability to enforce their criminal judgments, especially those in capital cases, and on the historic power of executives to exercise discretion in favor of mercy.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted since the Sixth Circuit Court of Appeals in *Woodard*, in an unprecedented action, applied the Due Process Clause to the purely executive function of clemency. Since all states provide for executive clemency, *Woodard* has a potential national impact.[1]

Historically and constitutionally, clemency has been the exclusive province of the almost completely unfettered discretion of the executive and has been immune from judicial review under traditional applications of the Due Process Clause. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 460 (1981). *Woodard* miscategorizes clemency as an integral part of the states' criminal adjudicative system and then goes on to misread *Evitts v. Lucey*, 469 U.S. 387 (1985) to create a second level of due process analysis. The *Woodard* opinion applies this new so-called "second strand" due process analysis to hold that clemency claimants are entitled to unidentified yet "barely perceptible" due process protections. This holding is not supported by either history or precedent and is barred by the doctrine of separation of powers between the executive and the judicial branches of government. It is certainly foreclosed by this Court's opinion in *Dumschat*.

Woodard's most fundamental error is to mischaracterize executive clemency as an integral part of the states' adjudication process for determining guilt or innocence under the states' criminal laws. Historically, clemency is the antithesis of the states' criminal adjudicatory process and instead is a non-judicial executive function that is based on extra-judicial concerns such as mercy and leniency. The decision is based on any information deemed pertinent to the decisionmaker without the constraints of procedure or precedent. Among the states, there is little or no

1. Petitioner is also presenting a second question to the Court relating to the application of the Fifth Amendment to clemency procedures. Although this brief concentrates only on the first question presented, amici curiae believe this Court should grant the petition as to both questions.

uniformity in the constitutional or statutory methods conferred on the executives in each state to dispense clemency. The one constant is the investment of virtually unfettered discretion in the executive branch. The injection of due process procedural requirements used by the judicial branch into this non-judicial process is contrary to the entire history and purpose of clemency and violates the separation of powers between these co-equal branches of government.

The *Woodard* opinion also introduces unprecedented levels of judicial review into a purely executive process which will further frustrate the states' interest in enforcing its judgments and interfere with the executives' clemency discretion. Ironically, just as this Court and the Congress have acted to revise and consolidate post-conviction review, *Woodard* further reopens issues already settled by this Court about state post-appellate review. *Woodard* improperly invites unprecedented and unnecessary federal judicial review of the states' judicial review systems as well as the executives' discretionary exercise of clemency. *Compare Sandin v. Connor*, ___ U.S ___, 115 S.Ct. 2293 (1995).

ARGUMENT

"[T]he expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1993). In *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 464, this Court held that inmates have no constitutional or inherent right to clemency. In *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990) this Court held that states which have otherwise complied with the Constitution's Eighth Amendment requirements, "enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished."

The States have organized their criminal justice systems in reliance on these holdings and the practices they represent.

Now, the Sixth Circuit's *Woodard* opinion potentially upsets the states' expectations based on these prior cases. For the first time, a federal court has held that state clemency claimants are entitled to unspecified "barely perceptible" due process protections traditionally only applied to review the state criminal adjudication process. Petn. at A-14. This holding is not supported by either history or case law. Unless review is granted, the opinion will surely add a new layer of delay and litigation in state and federal postconvictions cases, both capital and non-capital.

Woodard acknowledges that this Court in *Dumschat* held that clemency claimants do not have a liberty interest in the clemency proceedings themselves. However, *Woodard* then purports to discover a heretofore unknown "second strand" due process protection based on the majority's "belief" that clemency is an integral part of the states' criminal prosecution system for the adjudication of guilt or innocence. Petn. at A-11. Just as troubling, the *Woodard* opinion fails to even identify or describe these "barely perceptible" protections. The implication of the opinion is that clemency claimants may suddenly have unspecified, constitutionally guaranteed due process interests in the timing, notice, opportunity to be heard, discovery of information, and reasons for a clemency decision. Petn. at A-16.

Both of the premises of *Woodard* are wrong. Historically and constitutionally, clemency is not an integral part of the adjudication process and clemency claimants are not entitled to any due process procedural protections. Just as significantly, there is no "second strand" of due process protection within the Constitution. Both of these constitutional misconceptions in *Woodard* should be reviewed to preclude protracted and unnecessarily complex and costly litigation.

A. Woodard's Application Of The Due Process Clause To Clemency Is Constitutionally Inappropriate Since it Offends The Constitutional Plan for Federal-State Relations and the Historic Separation Of Powers Between The Judicial And Executive Branches Of Government

Woodard held that "barely perceptible" due process protections applied to Ohio's clemency process because the majority believed that clemency is an integral party of that state's adjudicative process for determining guilt and innocence. The *Woodard* majority analogized to this Court's holding in *Evitts v. Lucey*, 469 U.S. at 387 that defendants who appeal their criminal convictions were entitled to effective assistance of counsel since first appeals are an integral part of the states' adjudicative process.

However, *Woodard's* characterization of clemency as an integral part of Ohio's criminal justice system is fundamentally wrong. If the *Woodard* court had applied the appropriate due process analysis mandated by this Court in *Medina v. California*, at 437 and actually applied to clemency in *Herrera v. Collins*, 506 U.S. at 407-415 the majority would have concluded that clemency decisions in the states do not constitute adjudications and that determinations of guilt or innocence are not their primary objective.

In *Medina*, this Court reaffirmed that the states have the power to regulate their criminal justice systems. A state's decision does not violate the Due Process Clause unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina v. California*, at 445. Conspicuous by its absence in *Woodard* is the historical analysis of clemency necessary under *Medina*. This analysis confirms that clemency is not a judicial or even quasi judicial function and instead is the exclusive responsibility of a separate and independent branch of government.

The clemency power in England traces back to the eighth century. *Herrera v. Collins*, at 412. Chief Justice Marshall relied on the historic clemency power in England when he explained in

United States v. Wilson, 7 Pet. (32 U.S.) 150, 160-161 (1833), that "from time immemorial" the executive power of pardon has been a private, but official act of the executive. Clemency is not intended to be "communicated officially to the court" and is to be distinguished from a judicial act. The pardon power exists as an unlimited power of the executive which is to be exercised totally independent of any judicial proceeding. *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1866). This Court reiterated in *Dumschat* that state clemency "decisions have not traditionally been the business of courts . . . ." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 464.

The pardon power as defined in the United States Constitution is designed to be an executive "prerogative" that was not to be "fettered or embarrassed." *Schick v. Reed*, 419 U.S. 256, 263 (1974). "To the executive alone is intrusted the power of pardon; and it is granted without limit." *United States v. Klein*, 13 Wall. (80 U.S.) 128, 147 (1871). As Judge Learned Hand explained, "It [the President's power to pardon] is a matter of grace, over which courts have no review. . . . It is by no means true that 'due process of law' inevitably involves an eventual resort to courts, no matter what may be the interest at stake; not every government action is subject to review by judges." *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2nd Cir. 1950) cited with approval in *I.N.S. v. Yang*, ___ U.S. ___, 117 S.Ct. 350, 353 (1996); *see also Ex Parte United States*, 242 U.S. 27, 42 (1916).

Justice Cardozo explained the clemency power in *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y.App. 1919) as follows:

> Such an application [for clemency] is not a proceeding in court, nor one before an officer having "attributes similar" to a court's. [Citation omitted.] It is a petition for mere grace and mercy . . . It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there is argument of counsel. . . . At such a time anything is pertinent that may move the mind to

> doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion be stirred.[2]

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2. Until *Woodard*, both federal and state courts have had the restraint repeatedly to hold that clemency decisions are not judicial functions and that the executive has unlimited discretion. It is exclusively executive and not reviewable by the judiciary, even under the Due Process Clause. *Solem v. Helm*, 463 U.S. 277, 301 (1983); *Solesbee v. Balckom*, 339 U.S. 9, 12 (1950); *United States v. Patti*, 291 F.2d 745, 746 (3rd Cir. 1961); *Spinkellink v. Wainwright*, 578 F.2d 582, ___ (5th Cir. 1978); *Wainwright v. Brownlee*, 103 F.3d 708, 709 (8th Cir. 1997); *Peck v. Battey*, 721 F.2d 1157, 1159 (8th Cir. 1983); *Binion v. United States Department of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983); *Green v. Teets*, 244 F.2d 401, 403 (9th Cir. 1957); *Hatch v. State of Oklahoma*, 92 F.3d 1072, 1076 (10th Cir. 1996); *Bundy v. Dugger*, 850 F.2d 1402, 1423-1424 (11th Cir. 1988); *Eacret v. Holmes*, 333 P.2d 741, 744 (Ore. 1958) and cases cited therein; *Banks v. Arizona State Board of Pardons*, 629 P.2d 1035, 1037-1038 (Ariz. App. 1981); *Arnold v. Board of Pardons & Paroles*, 805 P.2d 388, 391 (Ariz. App. 1990); *Williams v. State*, 898 S.W.2d 38, 39 (Ark. 1995); *Penn v. State*, 670 S.W.2d 426, 430 (Ark. 1984); *People v. Warren*, 224 Cal.Rptr. 746, 755 (Cal.App.1986); *Jenkins v. Knight*, 293 P.2d 6 (Cal. 1956); *People v. Herrera*, 516 P.2d 626, 629 (1973) and cases cited therein (Colo. 1973); *People ex rel. Dunbar v. District Court*, 502 P.2d 420, 422 (Colo. 1972); *Sullivan v. Askew*, 348 S.2d 312, 319 (Fla. 1977); *Bundy v. State*, 497 S.2d 1209, 1211 (Fla. 1986); *People v. Bradney*, 652 N.E.2d 428, 431 (Ill.App. 1995); *People ex rel. Symonds v. Gualano*, 260 N.E.2d 284, 290 (Ill.App. 1970); *Misenheimer v. State*, 374 N.E.2d 523, 532 (Ind. 1978); *Colvin v. Bowen*, 399 N.E.2d 835, 838-840 (Ind.App. 1980); *Whittington v. Stevens*, 73 S.2d 137, 139-140 (Miss. 1954); *State v. Hunter*, 477 A.2d 797, 802-803 (Me. 1982); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970); *Otey v. State*, 485 N.W.2d 153, 163-165 (Neb. 1992); *State v. Robinson*, 356 A.2d 449, 455 (N.J. 1976); *Holder v. State*, 488 P.2d 600, 602 (Okla. App. 1971); *Hennessey v. Pennsylvania Board of Pardons*, 655 A.2d 218, 220 & fn.2 (Pa. 1995); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994); *Collins v. State*, 550 S.W.2D 643, 650 (Tenn. 1977); *R.R.E. v. Glenn*, 884 S.W.2d 189, 192 (Tex.App. 1994); *State v. Adams*, 115 S.E.2d 158, 163 (W.V. App. 1960); see also *Mallory v. State*, 435 P.2d 254, 255 (Id. 1967); *Milone v. Camp*, 22 F.3d 693, 705 (7th Cir. 1994)

While this Court's recent opinion in *Herrera v. Collins*, highlighted the opportunity for clemency in cases involving actual innocence, such determinations were not the primary historic function of clemency. Rather, the act of "pardon" was one of "forgiveness, release, remission." *Ex parte Wells*, 59 U.S. 307, 309 (1855). The pardoning power was intended to be an exception to the criminal code for cases of "unfortunate guilt" requiring "mitigation of the rigor of the law." *Schick v. Reed*, at 263 fn. 6 quoting *The Federalist No. 74*, pp. 500-501 (J. Cooke ed. 1961). Clemency is a decision based largely on the public interest and is not a mechanism for reviewing the defendant's guilt or innocence. See *Biddle v. Percovich*, 274 U.S. 480, 486 (1927). Indeed, grants of clemency often have carried and still do carry consequences of great disgrace, rather than exoneration. *Burdick v. United States*, 236 U.S. 79, 90-91 (1915) ("[T]he grace of pardon, though good in its intention, may be only in pretense or seeming. . . .") (Holmes, J.); *Murphy v. Ford*, 390 F.Supp. 1372, 1375 (W.D.Mich. 1975) (dismissing challenge to pardon of former President Nixon) (a pardon "does not wash out the moral stain . . . it involves forgiveness and not forgetfulness.")

Thus, on its own terms, *Woodard* is wrong. If the Sixth Circuit has truly spliced off a heretofore unseen "second strand" of due process, that mutant strand runs out long before the post conviction process reaches the executive clemency proceedings. Clemency is not part of the states' criminal justice systems for adjudicating guilt or innocence. The *Woodard* majority's principal authority, *Evitts* itself, characterized the first appeal as the "**final** step in the adjudication of guilt or innocence of the individual. . . ." *Evitts v. Lucey*, 469 U.S. at 404 [emphasis added]. This Court has refused to extend a due process analysis to the succeeding

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(no constitutional right to a clemency hearing); *Bean v. Nevada*, 410 F.Supp. 963 (D.Nev. 1974) *aff'd Bean v. Nevada*, 535 F.2d 542, 543 (9th Cir. 1976); *Rosenberg v. United States*, 346 U.S. 322 (1953) (Frankfurter, J. conc.) ("It is not for this Court even remotely to enter into the domain of clemency reserved by the Constitution exclusively to the President.")

stages of judicial post conviction review which normally occur well before the exercise of the executive clemency power. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Ross v. Moffitt*, 417 U.S. 600 (1974).

For example, this Court has characterized parole as an integral part of the penological system and specifically found it not to be a part of the criminal prosecution process. *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). This Court's subsequent analogizing of parole to clemency in *Dumschat* indicates that the clemency process is not part of the criminal prosecution system that contained the appellate system at issue in *Evitts*. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 464. This Court also went on in *Dumschat* to explain that clemency is also to be distinguished from parole decisions since clemency decisions are historically standardless.

As the *Woodard* dissent further points out, the *Dumschat* dissent raised the same arguments that were adopted by the *Woodard* majority. Petn. at A-35. Therefore, this Court already implicitly rejected those arguments in *Dumschat*. *Clemons v. Mississippi*, 494 U.S. 738, 747-748 fn. 3 (1990). Although Justice Brennan authored *Evitts*, he actually concurred in the majority opinion in *Dumschat* because the clemency decision was based on the historically unfettered discretion of the executive.

This Court has also recognized the inevitable problems and conflicts that occur when federal courts engage in reviewing "essentially discretionary elements of state governance. . . ." *Cf.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987). "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protections. . . ." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Intervention in this area raises "sensitive" and "troubling" issues relating to federal-state relations. *Herrera v. Collins*, 506 U.S. at 421 (C'Connor, J. conc.). *Woodard's* cryptic recognition of some sort of "barely perceptible" due process requirements for dispensing clemency smacks of the same kind of case-by-case approach to penal regulations this Court recently rejected in *Sandin v. Conner*, *supra*, at 2299-2300 and against which this Court has also drawn the line in post-conviction

procedures. *Coleman v. Thompson*, at 752; *Ross v. Moffit*, at 611-612. In light of *Woodard*, however, the pressure of new litigation to discover, explore, and enlarge these allegedly minimal, microscopic rights will be irresistible. Petn. at A-37. ("But once the camel's nose is under the tent . . . it may prove difficult to keep the rest of the animal out.")

Recognition of a heretofore unknown cause of action under section 1983 to judicially review an exercise of clemency will open the doors of the executive branch to the specter of intrusive federal civil discovery into what has always been considered confidential information. *Binion v. United States Department of Justice*, 695 F.2d at 1191. If such a possibility becomes reality in this case, it will be a further unwarranted byproduct of this invasion into what historically has been a purely executive function.

Based on history and precedent, the States have chosen a variety of ways to administer the executive clemency power. *Herrera v. Collins*, at 414. Surely, it cannot be said that the unfettered discretion of executive clemency violates the traditions and conscience of our People. *Medina v. California*, at 445.

"Our system of federalism encourages . . . state experimentation." *Greenholtz v. Nebraska Penal Inmates*, at 13. The imposition of burdensome or unwarranted procedures, coupled with federal court review, may lead to a curtailing of the clemency power altogether. *Ibid*. The development of increased proceduralism in both capital and non-capital cases actually increases the need for an equally unfettered clemency process. This Court endorsed the history of clemency under the Due Process Clause in *Herrera*. In doing so, this Court implicitly noted that the executive may consider evidence and arguments outside the purview of the judicial process. *Herrera v. Collins,* 506 U.S. at 417-419. As the plurality noted in *Gregg v. Georgia*, any prohibitions on discretion in the clemency process in capital cases would be totally alien to our notions of criminal justice and would be unconstitutional. *Gregg v. Georgia*, 428 U.S. 153, 199-200, fn. 50 (1976).

Amici submit that the "clemency process is-and should be-distinct from the judicial process. Mercy cannot be quantified or

institutional[illegible]. It is properly left to the conscience of the executive e[illegible]tled to consider pleas and should not be bound by court decisions meant to do justice . . . a frank, engaged painstaking process of authentic decision-making seems infinitely preferable to the dubious protections of proceduralism." Brown, *The Quality of Mercy*, 40 U.C.L.A. Law. Rev. 327, 328 (1992).

B. *Woodard's* Recognition And Use Of A New, So-Called "Second Strand" Due Process Analysis Is Constitutionally Inappropriate

Just as significantly, the "second strand" due process analysis *Woodard* applies to clemency is mere gossamer. The *Woodard* majority ignores the *Medina* analysis because it misapprehends *Evitts*. Petn. at A-12. In *Evitts*, this Court held that indigent criminal defendants who appeal their convictions are entitled to the effective assistance of counsel for their first appeal when the state has permitted such an appeal as a matter of right. *Evitts* categorized the first appeal as an integral part of the state's adjudicative process for determining guilt and innocence. This Court acknowledged that the states were not required to provide an appeal in all criminal cases, but explained that when the state chooses to act in an area where its action has "significant discretionary elements," it must act in accord with due process. *Evitts v. Lucey*, 469 U.S. at 401.

However, *Evitts* did not purport to create or to recognize any new "second strand" due process analysis. Ironically, *Evitts* itself is no more than an application of rule previously articulated by this Court in *Dumschat*: "A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 463. Consistent with *Dumschat*, *Evitts* focussed on the "nature" of the right rather than its relative "weight."

The state-created right in *Evitts* was a first appeal as a matter of right for criminal defendants. *Evitts* held that this state-created right "beget" a right to effective assistance of counsel on

appeal. This augmenting right was necessary because the State had acted to establish an appellate review process involving complex, intricate rules and procedures leading to a final judicial determination of guilt or innocence. *Evitts*, 469 U.S. at 394-395 fn. 6, 396, 402. This Court equated the denial of the effective assistance of counsel with the actual withdrawal of the right to appeal. *Id.*, at 400.

Evitts analogized its holding to *Morrissey v. Brewer*, *supra*. *Evitts v. Lucey*, 469 U.S. at 401. As previously noted, *Morrissey* is the lead case in a line of decisions including *Dumschat* and, most recently, *Sandin v. Connor*. *Morrissey* held that the state's creation of a parole system "beget" certain due process protections for parole revocation. Similar to the appellate right at issue in *Evitts*, parole revocation dealt with mixed issues of fact and law. Significantly, however, *Morrissey* also held that parole revocation is not part of the system for adjudicating guilt or innocence. *Morrissey v. Brewer*, 408 U.S. at 480. Moreover, in *Morrissey*, the Court distinguished between parole and the "ad hoc exercise of clemency. . . ." *Id.* at 477.

Morrissey led to this Court's decision in *Greenholtz v. Nebraska Penal Inmates*, *supra*. In *Greenholtz*, this Court recognized that the States had no duty to offer parole and that the mere availability of parole did not "beget" any due process protections. However, the mandatory nature of Nebraska's unique state parole release statute which limited the state's discretion in denying parole did entitle inmates to "some measure of constitutional protection." 442 U.S. at 12.

In *Dumschat*, this Court specifically rejected the argument that a state's practice in the wholly and expressly discretionary area of clemency created a constitutional entitlement. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 465. Moreover, absent any state law defining the obligations of the clemency authority, "the mere existence of a power to commute . . . create[s] no right or 'entitlement'." *Id.* at 467. "[T]he decisionmaker can deny the requested relief for any constitutionally permissible reason or for no reason at all." *Ibid.* (Brennan, J. conc.). Furthermore, as long as the ultimate decision was at the discretion of the decisionmaker,

state-created procedures for arriving at that decision do not create a liberty interest. *Compare Olim v. Wakinekona*, 461 U.S. 238, 248-251 (1983).

Thus, contrary to *Woodard*, *Evitts* is actually part of the same circle of cases that includes *Dumschat*, *Morrissey*, and *Greenholtz*. *Evitts* does no more than apply a rule that was earlier articulated in *Dumschat*.[3] Except for *Dumschat*, all of these cases "beget" degrees of due process protection to the possible termination or withdrawal or denial of state-created rights pursuant to various rules or standards. *Dumschat* did not apply due process protections to the executive clemency power because if clemency is to be effective it cannot be based on any particular rules, standards, procedures, grounds, criteria, or reasons. As *Dumschat* recognized, any other result would have been paradoxical. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. at 466. *Woodard* ignores this paradox.

In *Evitts*, it was the right to a judicial appeal as part of state's adjudicative process for determining guilt or innocence which was found to have due process implications. However, *Evitts* did not purport to establish a separate due process analysis based on the "integral" role of the procedure in the state's process. If this Court had based its holding on that premise, then *Evitts* would have been inconsistent with this Court's jurisprudence which holds that due process protections are determined by the "nature" of the right at issue, not its "weight." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. at 7. It was for this reason that this Court held in *Dumschat* that clemency does not "beget" due process protections because there is no right at issue — only an expectation or unilateral hope. *Woodard* makes the mistake of focussing on what it perceives to be the "weight" of the "right" at issue, rather than its "nature." *Woodard* ignored the real common meaning of both *Dumschat* and *Evitts*.

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3. *Evitts*'s description of the "integral role" of appeals also does no more than repeat language first used by this Court in *Griffin v. Illinois*, 351 U.S. 12, 18 (1955).

The *Woodard* opinion's recognition and use of a heretofore unknown "second strand" of due process is rife for mischief. Until *Woodard*, the integral role of a particular procedure in a state's criminal adjudication system was not determinative of due process protections. This Court's other decisions which held that traditional procedural due process protections did not apply to discretionary appeals and state collateral review were consistent with that approach. See, e.g. *Coleman v. Thompson*, *supra*; *Ross v. Moffitt*, *supra*. *Woodard's* discovery of a "barely perceptible" microscopic "second strand" due process right ignores the line and logic of these other cases. Just as ominously, in the same way that *Woodard* has now reopened the clemency issue decided in *Dumschat*, it reopens the issues in those other cases as well.

Amici submit that *Woodard's* splicing of a "second strand" of due process amounts to nothing more than result-oriented hairsplitting. It is inconsistent with this Court's due process cases as exemplified by *Dumschat*, *Medina* and *Evitts*. This Court should grant the petition for writ of certiorari to stabilize the due process jurisprudence potentially disrupted by *Woodard*.

The decision to grant or deny clemency and the means used by the executive branch to make this decision are not compatible with judicial review. In fact, judicial review of this ancient executive prerogative would itself involve an unconstitutional violation of the separation of powers doctrine.

CONCLUSION

For the reasons stated, as well as those set forth in the petition for writ of certiorari, amici curiae request that the petition be granted.

Dated: June 4, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WARD A. CAMPBELL
Deputy Attorney General

WILLIAM G. PRAHL
Deputy Attorney General
Counsel of Record

Counsel for Amici Curiae

WAC:msd

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

(5)

No. 96-1769

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioner,

v.

EUGENE WOODARD,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

JOINT APPENDIX

BETTY D. MONTGOMERY
Ohio Attorney General

JEFFREY S. SUTTON
State Solicitor of Ohio
(Counsel of Record)
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 466-8980

Counsel for Petitioner

DAVID H. BODIKER
Ohio Public Defender

RICHARD VICKERS
Post-Conviction Supervisor,
Death Penalty Division
MICHAEL BENZA
Assistant State Public Defender
(Counsel of Record)

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

Counsel for Respondent

Petition for Certiorari filed May 6, 1997
Certiorari granted June 27, 1997

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[1]Exhibits A and B as well as two unlabeled exhibits that were submitted with the complaint are included. Exhibit A is also printed in the text at page 1 of the Petition for Certiorari.

RELEVANT DOCKET ENTRIES

I. IN THE DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

1. 9/14/94 Complaint

2. 9/16/94 Consent Decree

3. 11/23/94 Answer by Defendants

4. 1/9/95 Motion by defendants for judgment on the pleadings

5. 2/9/95 Memo in opposition by plaintiff to motion for judgment on the pleadings, etc.

6. 6/20/95 Report and Recommendation

7. 7/5/95 Objections by Plaintiff to Report and Recommendation

8. 9/8/95 Opinion and Order

9. 9/8/95 Judgment Adopting Report and Recommendation

10. 10/10/95 Notice of Appeal by Plaintiff

II. IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. 3/3/97 Opinion

2. 3/3/97 Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,	)	
	)	C2-94-892
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	
OHIO ADULT PAROLE AUTHORITY, et al.	)	JUDGE KINNEARY
	)	MAGISTRATE JUDGE KEMP
Defendants.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

Eugene Woodard, by and through his undersigned counsel, brings this Complaint against the Defendants and states as follows:

1. This is a civil action for declaratory and injunctive relief to redress the continuing deprivation of rights secured by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States and Title 42 U.S.C. § 1983.

II. PARTIES

2. The Plaintiff in this action is a convicted and capitally sentenced prisoner incarcerated in the Southern Ohio Correctional Facility in Lucasville, Scioto County, Ohio.

3. The Plaintiff brings this action on his own behalf as the Defendants are attempting to apply the Death Penalty Clemency Procedure (attached as Exhibit A) to him.

4. The Defendants are the Ohio Adult Parole Authority (APA), the Parole Board, and the individual members of the APA and the Parole Board in their individual and official capacities. The APA is an independent division of the Department of Rehabilitation and Correction, an agency of the executive branch of the government of the State of Ohio with its offices in Columbus, Franklin County, Ohio. One function of the APA is to make clemency recommendations to the governor of Ohio in death penalty cases. The Parole Board is a division of the APA assigned to reviewing and conducting clemency hearings.

5. Plaintiff does *not* contemplate that this action will have any effect on his state convictions and/or sentences (including his death sentence), nor does Plaintiff intend that this action constitute a petition for habeas corpus.

III. JURISDICTIONAL STATEMENT

6. This Court has jurisdiction over this action pursuant to Article III, Section 2 of the Constitution of the United States and 28 U.S.C. § 1343(a)(3) and §2201.

7. Venue is proper in this district under 28 U.S.C. § 1391(b) and S.D. Ohio L.R. 3.3(c).

IV. FACTUAL BACKGROUND

8. Mr. Woodard has exhausted his direct appeals to the Ohio Court of Appeals, Eighth Judicial District, the Supreme Court of the State of Ohio, and the Supreme Court of the United States denied certiorari. The Supreme Court of Ohio issued a Stay of Execution on August 24, 1994 (attached as Exhibit B) to allow Mr. Woodard to pursue state post-conviction relief and that Stay of Execution is currently in effect. Mr. Woodard's petition for post-conviction relief is due on January 18, 1995.

9. On September 6, 1994, counsel for Mr. Woodard was informally told that a clemency hearing was scheduled for Mr. Woodard on September 16, 1994. Counsel was informed that the APA would interview Mr. Woodard on September 9, 1994, at the Southern Ohio Correctional Facility (SOCF).

10. This hearing and interview were to be conducted according to the new Death Penalty Clemency Procedure (Clemency Procedure) adopted by the APA. Pursuant to the Clemency Procedure, Mr. Woodard is not entitled to have counsel present at the hearing or interview. Furthermore, under the Clemency Procedure neither Mr. Woodard nor his counsel are permitted to present any documentary evidence in support of clemency, nor is testimony allowed, other than the uncounseled statement of Mr. Woodard.

11. On September 7, 1994, counsel for Mr. Woodard sent a letter to the APA objecting to the clemency hearing and interview, requesting the right to be present for all interviews and hearings, requesting a continuance of the proceedings on the basis that a stay of execution was in effect, that counsel was only recently appointed and could not effectively represent Mr. Woodard's interest in a clemency hearing, and that the information and investigation

necessary for a proper and thorough clemency review was not complete.

12. To date the APA has not responded to these requests.

13. On September 9, 1994, counsel for Mr. Woodard visited with Mr. Woodard at the SOCF. The APA did not meet or talk with Mr. Woodard or counsel for Mr. Woodard although all parties were present at the SOCF at the same time.

14. To the best of Mr. Woodard's knowledge the APA continues to intend to conduct an *ex parte* clemency hearing in his case on September 16, 1994. Should this hearing take place Mr. Woodard will be precluded from requesting additional clemency proceedings in his capital case without leave of the APA.

15. Plaintiff is currently engaged in ongoing litigation regarding his individual conviction and sentence. In this case, the State of Ohio is a party, actively seeking the execution of Mr. Woodard. The defendants are agents, representatives, and agencies of the State of Ohio. As such, they cannot require Mr. Woodard to discuss the ongoing litigation without the presence of counsel.

COUNT ONE

16. Plaintiff realleges paragraphs One through Fifteen of this complaint, as if fully rewritten herein.

17. Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights against self-incrimination, to effective assistance of counsel, to be

free of cruel and unusual punishment, to the equal protection of the law, to request and zealously argue for clemency, and to substantive and procedural due process.

18. Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his right to have the State not interfere in and adversely affect his attorney-client relationship and his counsel's ability to effectively represent him in collateral proceedings in the state and federal courts and in future clemency proceedings, which proceedings will directly determine whether Mr. Woodard will live or die.

19. Mr. Woodard will be irreparably harmed in that he will be permanently deprived of his right to have the State of Ohio conduct its clemency process, by which it ultimately decides which death-sentenced prisoners will be executed, in a non-arbitrary and capricious manner after a thorough investigation (as required by Ohio law) and a meaningful opportunity for the prisoner to apply and be considered for clemency.

PRAYER FOR RELIEF

WHEREFORE, Eugene Woodard respectfully requests the following relief:

(1) A declaration that the policy of the APA is unconstitutional in that it tortiously interferes with the Fifth and Fourteenth Amendment rights to remain silent, Sixth and Fourteenth Amendment rights to counsel, the Eighth and Fourteenth Amendment rights to be free of cruel and unusual punishment, and the Ninth and Fourteenth Amendments' guarantee of substantive and procedural due process and to the equal protection of the law.

(2) A preliminary injunction providing that the

Defendants may not interview the Plaintiff without the consent and presence of counsel;

(3) A preliminary injunction providing that the Defendants may not conduct a clemency hearing in regard to the Plaintiff until such time as the plaintiff petitions for such a hearing, or, in the alternative, until such time as there is a thorough investigation as required by Ohio law, including a meaningful opportunity for Plaintiff to apply for clemency;

(4) An order enjoining the Defendants from applying the Death Penalty Clemency Procedure to the Plaintiff;

(5) An order that Plaintiff be awarded costs and attorneys' fees;

(6) An award to the Plaintiff of such other and further relief as the Court may deem just and proper, but *not* including vacation of his state convictions and/or sentences, including his death sentence.

[SUBSCRIPTION OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

[ACKNOWLEDGMENT OMITTED IN PRINTING]

EXHIBIT A

DEATH PENALTY CLEMENCY PROCEDURE

[CODE AND SECTION REFERENCES OMITTED IN PRINTING]

[APPROVAL SIGNATURE OMITTED IN PRINTING]

EFFECTIVE DATE: JULY 21, 1994

I. *AUTHORITY*

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. *PURPOSE*

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. *APPLICABILITY*

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing

them.

IV. *DEFINITIONS*

None.

V. *POLICY*

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

VI. *PROCEDURE*

A. Notification to all condemned inmates of this policy.

1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death shall be given a copy of this policy.

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.

2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.

3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximately twenty-one days prior to the scheduled execution date. The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.

4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a psychological or psychiatric evaluation as determined appropriate by the Parole Board.

2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by this parole board chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.

2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.

3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.

2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.

   Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.

3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the

prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of

the condemned prisoner, the Parole Board may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

EXHIBIT B

THE SUPREME COURT OF OHIO

1994 TERM

To wit: August 24, 1994

State of Ohio, :
Appellee, : Case No. 92-1257

v. :
ENTRY

Eugene Woodard, :
Appellant. : (Cuyahoga County)

UPON CONSIDERATION of the motion filed by counsel for appellant to stay the execution of sentence in the above-styled cause pending the exhaustion of state post-conviction remedies,

IT IS ORDERED by the Court that the motion be, and is hereby, granted.

IT IS FURTHER ORDERED by the Court that, pursuant to *State v. Glenn* (1987), 33 Ohio St. 3d 601, a stay is granted for a period of 6 months, beginning July 18, 1994, and ending January 18, 1995, to allow appellant an opportunity to file a petition for post-conviction relief. If a petition for post-conviction relief is not filed within the time allotted, this stay will expire. No further time for the filing of the petition will be granted except in unusual circumstances.

IT IS FURTHER ORDERED by the Court that, if a petition for post-conviction relief is filed within the time allotted, a date-stamped copy of the petition shall be filed by appellant with the Clerk of this Court, and this stay shall remain in effect until exhaustion of all state post-conviction proceedings, including any appeals.

IT IS FURTHER ORDERED by the Court that compliance with the mandate and execution of sentence be, and is hereby, stayed for the 6-month period allotted by this order and, if a petition for post-conviction relief is filed within the time allotted, pending the exhaustion of all proceedings for post-conviction relief before the courts of this State.

IT IS FURTHER ORDERED that counsel for the appellant and for the appellee shall notify this Court when all proceedings for post-conviction relief before courts of this state have been exhausted.

(Cuyahoga County Court of Appeals; Case No. 61171)

THOMAS J. MOYER
Chief Justice

[LETTER FROM OHIO PUBLIC DEFENDER TO OHIO ADULT PAROLE AUTHORITY]

September 7, 1994

Dear Ms. Ghee:

This letter is to inform you that we represent Eugene Woodard, Inmate #236-627. It recently came to our attention that the Adult Parole Authority plans to hold a clemency hearing for Mr. Woodard on September 16, 1994. Mr. Woodard did have an execution date of October 7, 1994 but received a stay of execution from the Supreme Court of Ohio on August 24, 1994. The stay was granted on the forty-fifth day before Mr. Woodard's scheduled execution date. As such, Mr. Woodard does not face imminent execution. Moreover, Mr. Woodard is just beginning his state post-conviction appeals. Upon the completion of his state appeals, if relief is not granted, Mr. Woodard will pursue habeas corpus relief in the federal courts. Therefore, as a practical matter, any clemency proceeding at this juncture is just untimely.

We also request the right to be present for, and to actively participate in, any interviews or hearings regarding Mr. Woodard. As Mr. Woodard's attorneys we are charged with zealously representing his interests. We can only do that if we are permitted to participate in all proceedings, prepare and present a proper clemency petition and rebut any arguments made against Mr. Woodard. To this end, we must be permitted to attend and participate in any interview or hearing held regarding Mr. Woodard. We ask that you notify us of the time and place of any interviews and hearings sufficiently in advance so that we can attend and

prepare for them.

Furthermore, we recently took over the representation of Mr. Woodard and are not in a position to effectively represent his interests or present his case. As Mr. Woodard is represented by counsel, he is entitled to the effective assistance of counsel and we cannot provide that assistance without adequate opportunity to prepare for the hearing. Preparation for any hearing, at the very minimum, will require the assimilation of information obtained in the state post-conviction investigation presently being conducted on Mr. Woodard's behalf. Therefore, we request a continuance until February, 1995, in order to properly present pertinent matter to the Clemency Board.

Until that time, we have instructed Mr. Woodard to refuse to discuss his case, life or situation with anyone unless we are present. To this end, we request you cancel the interview planned for September 9, 1994. Not only have we not been formally notified of this interview, or even of the clemency hearing itself, but Mr. Woodard is involved in ongoing litigation of his capital trial and sentence and possesses a Fifth Amendment right not to incriminate himself. Therefore, Mr. Woodard must not comment on his case or discuss his situation with anyone, especially representatives of the State of Ohio.

We look forward to your prompt response to this letter and hope that an appropriate resolution to this situation can be obtained.

[SUBSCRIPTION OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

AFFIDAVIT OF MICHAEL J. BENZA

1. I am an attorney licensed to practice law in the State of Ohio.

2. I am currently employed as an Assistant State Public Defender with the Office of the Ohio Public Defender, in Columbus, Ohio.

3. I represent Eugene Woodard in all matters relating to his conviction and capital sentence.

4. On September 6, 1994, I was informed that the Ohio Adult Parole Authority had scheduled an interview of Eugene Woodard for September 9, 1994, and that a clemency hearing was scheduled for September 16, 1994.

5. On September 7, 1994, I sent a letter to the Adult Parole Authority requesting that the clemency hearing be canceled, or, in the alternative, that I be permitted to represent Mr. Woodard's interests at any interviews and hearings, and that any interviews and hearings be continued to allow me to prepare for the interviews and hearings.

6. As of September 14, 1994, I have not received any response from the Adult Parole Authority to these

requests.

7. On September 9, 1994, I visited Mr. Woodard at the Southern Ohio Correctional Facility. At that time I was informed that representatives of the Adult Parole Authority were in the institution. Mr. Woodard and I were available to meet with them but they did not meet with us.

FURTHER AFFIANT SAYETH NAUGHT.

[JURAT OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,	)	
	)	C2-94-892
Plaintiff,	)	
	)	Date filed:
v.	)	September 16, 1994
	)	
OHIO ADULT PAROLE	)	
AUTHORITY, et al.,	)	
	)	
Defendants.	)	

CONSENT DECREE

WHEREAS, the complaint in the above captioned matter having been filed herein, and the Plaintiff Eugene Woodard and Defendants the Ohio Adult Parole Authority, the Parole Board, Jill Goldhart, Margarette Ghee, Walter Echols, Raymond E. Capots, William E. Hudson, Robert E. Smith, H. Richard Gooch, Gloria R. Andrews, Jay R. Denton, and Constance M. Upper having consented to the entry of this order,

NOW, therefore without a hearing on Plaintiff's request for a Temporary Restraining Order and upon consent of the parties hereto, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1) The Clemency Hearing scheduled for Eugene Woodard to be held at 1:00 p.m., on September 16, 1994 at

the Central Offices of the Ohio Adult Parole Authority and before the Parole Board is postponed indefinitely by the Parole Board.

2) While this action is pending no clemency hearings or clemency interviews regarding Mr. Woodard will be held without 30 days notice of this Honorable Court, counsel for Mr. Woodard, and Mr. Woodard.

3) The Plaintiff's application for a Temporary Restraining Order is withdrawn pending the resolution of the Plaintiff's request for a Preliminary and Permanent injunction.

4) All rights and privileges of the parties are hereby reserved.

/s/ Joseph P. Kinneary
Judge Joseph P. Kinneary

Approved:

/s/ Richard J. Vickers	/s/ John J. Gideon
Richard J. Vickers - 0032997	John J. Gideon - 0008151
Assistant State Public Defender	Assistant Attorney General
Attorney for Plaintiff	Authorized Representative
Authorized Representative of	of the Defendants
the Plaintiff	
Trial Attorney	

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

ANSWER OF DEFENDANTS OHIO ADULT PAROLE AUTHORITY, JILL GOLDHART, MARGARETTE GHEE, WALTER ECHOLS, RAYMOND E. CAPOTS, WILLIAM E. HUDSON, ROBERT E. SMITH, RICHARD GOOCH, GLORIA ANDREWS, JAY R. DENTON, AND CONSTANCE M. UPPER

1. Defendants admit that this Court has jurisdiction in matters brought under 42 U.S.C. §1983, but deny that this Court has jurisdiction over the subject matter of the instant action as alleged in the complaint.

2. Defendants admit the allegations contained in paragraph 2 of the complaint.

3. Defendants admit the allegations contained in paragraph 3 of the complaint.

4. Defendants admit the allegations contained in paragraph 4 of the complaint.

5. Defendants deny the allegation contained in paragraph 5 of the complaint for want of information sufficient to form a belief.

6. Defendants admit that this Court has

jurisdiction in matters brought pursuant to 28 U.S.C. §1343(a)(3) and §2201, but deny this Court has jurisdiction over the subject matter of the instant action as alleged in the complaint.

7. Defendants admit the allegations contained in paragraph 7 of the complaint.

8. In response to the allegations contained in paragraph 8, the defendants admit that the plaintiff has exhausted his direct appeal to Ohio courts; that the United States Supreme Court has denied plaintiff's petition for writ of certiorari; and that the Ohio Supreme Court has issued a stay of execution. For want of information sufficient to form a belief defendants deny that plaintiff's post-conviction petition is due on January 18, 1995.

9. For want of information sufficient to form a belief, defendants deny the allegations contained in paragraph 9.

10. In response to the allegations contained in paragraph 10 of the complaint, the defendants admit that the Death Penalty Clemency Procedure effective July 21, 1994 is applicable to the plaintiff's case and that under those procedures, plaintiff is not entitled to the presence of counsel at the interview or hearing. Defendants deny that plaintiff is not permitted to present documentary evidence in support of clemency. In regard to the offer of testimony, defendants admit that attendance by others at the hearing is at the discretion of the parole board chair.

11. Defendants admit the allegations contained in paragraph 11.

12. In view of the consent order entered on

September 16, 1994, the defendants deny the allegations contained in paragraph 12.

13. For want of information sufficient to form a belief, the allegations contained in paragraph 13 are denied.

14. In view of the consent order issued on September 16, 1994, the defendants deny the allegations contained in paragraph 14.

15. In response to the allegations contained in paragraph 15, the defendants admit that plaintiff is challenging his sentence to death in the courts of Ohio. Defendants further admit that plaintiff may request in writing to be interviewed in accordance with the Death Penalty Clemency Procedure. Defendants admit that the Adult Parole Authority is an Agency of the Executive Branch of the government of the State of Ohio and that the named defendants are employees of that agency. Defendants deny that the Adult Parole Authority and its employees are actively seeking the execution of the plaintiff. Defendants deny plaintiff is required to discuss ongoing litigation.

16. Paragraph 16 does not set forth averments which call for an admission or denial.

17. Defendants deny the allegations contained in paragraph 17.

18. Defendants deny the allegations contained in paragraph 18.

19. Defendants deny the allegations contained in paragraph 19.

20. Defendants deny each and every allegation

contained in the complaint not specifically admitted in this answer.

AFFIRMATIVE DEFENSE

21. The Court lacks jurisdiction over the subject matter of the complaint.

22. The complaint fails to state a claim upon which relief can be granted.

Wherefore, Defendants Ohio Adult Parole Authority, Goldhart, Ghee, Echols, Capots, Hudson, Smith, Gooch, Andrews, Denton, and Upper request that the plaintiff's complaint be dismissed.

[SUBSCRIPTION OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

MOTION OF DEFENDANTS OHIO ADULT PAROLE AUTHORITY, JILL GOLDHART, MARGARETTE GHEE, WALTER ECHOLS, RAYMOND E. CAPOTS, WILLIAM E. HUDSON, ROBERT E. SMITH, RICHARD GOOCH, GLORIA ANDREWS, JAY R. DENTON AND CONSTANCE M. UPPER, FOR JUDGMENT ON THE PLEADINGS

Come now the defendants by and through counsel moving the Court for an order rendering judgment in their favor and dismissing the complaint pursuant to Rule 12 (C) of the Federal Rules of Civil Procedure for failing to state a claim upon which relief can be granted. *Morgan v. Churches Fried Chicken*, 829 F. 2d 10, ii (6th. Cir. 1987) A memorandum in support of motion follows.

[SUBSCRIPTION OMITTED IN PRINTING]

MEMORANDUM IN SUPPORT

STATEMENT OF FACTS

The plaintiff has been sentenced to death for aggravated murder. Because the execution was not stayed forty-five days prior to the scheduled execution date, the Ohio Adult Parole Authority (APA) was scheduled to convene on September 16, 1994, to consider whether to recommend to the Governor of Ohio clemency for plaintiff Woodard. Such hearing *(ex parte* meeting) of the Parole Board was pursuant to the provisions of the Death Penalty Clemency Procedure and consist of a non-adversarial review of the record. Based upon the record and submitted correspondence, a recommendation was to be made. Woodard was offered an opportunity to make a statement to the APA by means of a pre-review interview. He declined.

On September 15, 1994, the parties agreed to postpone the clemency hearing in this case and not to re-schedule a hearing while this suit was pending without thirty days notice to the Court and the plaintiff.

Woodard alleges that the Death Penalty Clemency Procedure interferes with his right to counsel, his right to remain silent, his right to be free from cruel and unusual punishment, and his right to substantive and procedural due process. He asks the Court to declare the Death Penalty Procedure unconstitutional on its face and as applied; to enjoin the defendants from interviewing the plaintiff without the consent and presence of counsel, and to enjoin the defendants from conducting any clemency hearing until the plaintiff petitions for such a hearing.

ARGUMENTS AND LAW

In order to grant the relief requested by the complaint, it is submitted that the Court must find that the plaintiff has a right to mercy or some other right mandated by the Constitution or state law; that the clemency procedure is a critical stage in a criminal proceeding to which the right to counsel attaches; and that the clemency process requires the plaintiff to make statements which could tend to expose him to criminal prosecution. Although this Court must liberally construe the complaint in favor of the plaintiff, *Kugler v. Helfant*, 421 U.S. 117, 125-26 n.5 (1975), the Court need not accept conclusions of law and unwarranted inferences cast in the form of factual allegations. *Blackburn* v. *Fisk Univ.*, 443 F.2d 121, 124 (6th Cir. 1971). The defendants respectfully submit that as a matter of law, the plaintiff cannot establish any facts to support his claims.

THERE IS NO CONSTITUTIONAL RIGHT TO MERCY IN OHIO

The Federal Constitution gives to the President the "Power to grant Reprieves and Pardons for Offenses against the United States." Art.II, § 2. cl. 1. Other than reposing power in the President to grant pardons and reprieves, the Constitution itself is silent on the matter clemency for convicted criminals. Accordingly "...[A]n inmate has no constitutional or inherent right to commutation of his sentence." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981); *Otey v. Stenberg*, 34 F.3d 645 (8th Cir. 1994); *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993).

Nonetheless, a right can be created by state law which is entitled to due process protection through the Fourteenth Amendment. *Meachum v. Fano*, 427 U.S. 215, 226 (1976). No right to due process arises except where the state undertakes to deprive a person of one or more specified interests: life, liberty, or property. *Inmates v. Ohio Adult*

Parole Authority, 929 F.2d 233, 235 (6th Cir. 1991). There is no "liberty" interest in early release (or commutation of sentence). *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 2 (1979); *Connecticut Bd of Pardons v. Dumschat, supra.*

A ground for a constitutional challenge, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency. *Connecticut Bd. of Pardons v. Dumschat, supra* at 465; *Sweeton v. Brown*, 27 F.3d 1162, 1168 (6th Cir. 1994). However, an underlying right must exist before due process protection vests. *Connecticut Bd. of Pardons v. Dumschat, supra.* at 464.

Article III §11 of the Ohio Constitution vests in the Governor the power

> ...after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law.

In *State ex rel. Maurer v. Sheward*, Case # 93-1165, (Ohio Supreme Court, December 30, 1994), the Ohio Supreme Court stated that " The General Assembly is not authorized to prescribe substantive regulations concerning the Governor's discretion in the use of the clemency power, or in any way intrude on the discretion of the Governor. For example, the General Assembly could not, acting under the limited authority provided by Section 11, Article III, enact a statute requiring the Governor to accept the recommendation of the APA in the exercise of his clemency power. Likewise, the General Assembly could not enact a statute

forbidding the Governor from exercising the clemency power in any specific class of cases."

The effect of the *Maurer* decision is that with respect to any form of clemency there is no Ohio law regulating the Governor's discretion in the use of the clemency power beyond Article III of the Ohio Constitution. Accordingly, in Ohio, state law establishes no criteria, entitlement or duty with respect to clemency in a death penalty case. Therefore, Woodard can identify no state-created right to which Fourteenth Amendment due process rights apply. *Connecticut Bd of Pardons v. Dumschat, supra* at 465-67.

Assuming *arguendo,* that a pending motion for reconsideration of *Maurer* results in the Ohio Supreme Court reversing itself by holding that all of the Governor's clemency powers can be procedurally regulated under the Ohio Constitution, the defendants respectfully submit that no state-created right in clemency is established by the laws of Ohio and thereby entitled to due process protection.

O.R.C. §2967.07 provides:

> All application for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes

> relating to the case.

Page's Ohio Revised Code, Annotated (1993). Accordingly, the statute allows the Governor to *sua sponte* direct the APA to review a capitol case for clemency and submit a recommendation. The statute does not require an inmate to initiate or participate in the proceedings.

The APA is guided in developing its recommendation by O.R.C. §2967.03, which provides in pertinent part:

> The authority may recommend to the governor the pardon, commutation, or reprieve of sentence of any convict or prisoner, or grant a parole to any prisoner, if in its judgment there is reasonable ground to believe that, if the convict is granted a pardon, commutation, or reprieve, or the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society. However, the authority shall not recommend a pardon or commutation of sentence of, or grant a parole to, any convict or prisoner until the authority has complied with the applicable notice requirements of section 2967.12 of the Revised Code, and has considered any statement made by a victim or a representative member of a victim's family that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to division (C) of section 2943.041[2943.044.1] or division (C) of section 2945.07 of the Revised code and any other statement made by a victim or a representative member of a victim's family

that is relevant to the convict's or prisoner's case and that was received by the authority after it provided notice of the pendency of the action under section 2967.12 of the Revised Code. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish, at the request of the authority, a summarized statement of the facts provided at the trial, and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for such recommendation.

Page's Ohio Revised Code Annotated (1993).

Section 2967.03 is further implemented by Ohio Administrative Code, Chapter 5120:1-1:

A. All applications for pardon, reprieve or commutation of sentence shall be made in writing to the Chief of the Adult Parole Authority.

B. When an application for a pardon, reprieve or commutation of sentence is filed with the Chief of the Adult Parole Authority, the authority shall conduct such investigation as is necessary and make a recommendation to the governor. A hearing may be held at the discretion of the Parole Board. Such hearing if held, shall be before at least a majority of the members of the Parole Board.

C. At least three weeks prior to any hearing held to consider pardon, reprieve or commutation of sentence, notice of such hearing shall be sent to the prosecuting attorney and the judge of the Court of Common Pleas of the county in which the indictment against the applicant was found, and, if required by section 2967.12 of the Revised Code, to the victim or victim's family. Where there is more than one judge of the court of common pleas, the notice shall be sent to the presiding judge.

D. Such notice shall contain the following:

1. The name of the applicant;
2. The crime for which the applicant was convicted;
3. The date of conviction;
4. The term of sentence.

E. In the event the hearing is continued, notice of such continuance and the date of the continued hearing shall be sent to all interested parties at least ten (10) days prior to the date of the continued hearing.

F. In the event the decision of the Parole Board is to recommend for or against pardon, reprieve, or commutation of sentence, such recommendation shall be forwarded to the Governor, together with a brief statement of the facts, the grounds for such recommendation, and the record or minutes of the case.

G. The decision of the Parole Board to recommend for or against pardon, reprieve or commutation of sentence shall be within its sole discretion and shall not be subject to administrative review.

H. If the adult parole authority receives an application for pardon, commutation or reprieve for a person for whom executive clemency was denied less than two years earlier than the date the subsequent application was received, and the authority does not believe that the application contains any grounds that were not or could not have been presented in the earlier application, the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial. In such a case, no hearing and no further investigation shall be necessary unless specifically requested by the governor.

I. The adult parole authority shall consider a case for pardon or commutation only upon the application of the convicted person or his counsel or at the direction of the governor.

It is clear that neither Chapter 2967 of the Revised Code nor 5120:1-1-15 of the Administrative Code dictate explicit standards which require the Adult Parole Authority or the individual defendants to recommend clemency or for the Governor to grant or deny clemency. Indeed, in *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir. 1979), the Sixth Circuit held that "...§2967.03 is purely discretionary." Id. at 867. In *Inmates v. Ohio Adult Parole Authority*, 929 F.2d 233 (6th

Cir. 1991) the Sixth Circuit elaborated its construction of §2967.03:

> The statute says that the Ohio Adult Parole Authority "*may*...grant a parole to any prisoner if in its judgment there is reasonable grounds to believe that, if ... the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society." Ohio Revised Code §2967.03 (emphasis supplied) The grant of discretion contained in the statute is, obviously, very broad indeed. The operative verb is permissive, not mandatory: to say that the Adult Parole Authority "may grant" parole is not to say it must grant parole.

Id. at 236.

The clear weight of authority in both the Ohio and federal courts construing §2967.03 is that Adult Parole Authority action pursuant to the statute is entirely discretionary. *State ex rel. Blake v. Shoemaker*, 4 Ohio St. 3d 42 (1983); *State ex rel. Hattie v. Goldhardt*, 69 Ohio St. 123 (1994); *Inmates v. Ohio Adult Parole Authority*, *supra* at 235; *Wagner v. Gilligan*, *supra* at 867; *Sweeton v. Brown*, *supra* at 1167. *See also Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *Jago v. Van Curen*, 454 U.S. 14, 17 (1981). Accordingly, there is absolutely no basis to find that Ohio law has created a liberty interest in clemency to which due process rights under the Fourteenth Amendment attach. *Sweeton v. Brown, supra.*

THERE IS NO SIXTH AMENDMENT RIGHT TO COUNSEL IN CLEMENCY PROCEEDINGS

The Sixth Amendment right to counsel by its very terms is limited to criminal proceedings. *Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960). Clearly the clemency review of the Adult Parole Authority cannot be considered a criminal proceeding.

Likewise, an argument that clemency review is an integral part of the prior criminal proceedings in a capital case is devoid of merit. The Constitution does not require a state to enact a clemency mechanism at all. *Herrera v. Collins*, 113 S.Ct. 853, 867 (1993). Furthermore, it is well settled that the right to counsel extends only to the first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Pennsylvania v. Finley*, 481 U.S. 551 (1990); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991). Accordingly, an *ex parte* clemency review by the executive branch of government cannot be a "critical stage" in the criminal proceedings to which the right to counsel obtains.

Moreover, there is no right to counsel at a pre-sentencing hearing with a probation officer. *United States v. Hicks*, 948 F.2d 877 (4th Cir. 1991); *United States v. Jackson*, 886 F.2d 838 (7th Cir. 1987). If the Sixth Amendment right to counsel does not extend to an interview with a probation officer the results of which will be communicated to the court and considered in the imposition of sentence, it is clear that the right to counsel does not extend to an interview for the purposes of clemency conducted long-after the direct appeal is final.

Furthermore, contrary to the conclusory allegations of the complaint, the Death Penalty Clemency Procedures do not interfere with the "attorney-client relationship and counsel's ability to represent [Woodard] in state and federal courts and future clemency proceedings...." The procedures

do not in any manner deny Woodard the right to consult with counsel prior to making an election whether or not to submit to an interview by the Parole Board, the desired message to the Board during the interview, and what matters to submit to the Board in support of clemency.[1] Indeed, counsel is free to submit any briefs or argument in support of clemency he cares to. On the other hand, the Board desires to hear the condemned speak for himself at least in small part, in weighing the appropriateness of a recommendation for clemency. This procedure no more interferes with the attorney-client relationship than the necessary election of the accused at trial to take the stand or not during the punishment phase of a capital trial.

The Death Penalty Clemency Procedures Do Not Require Woodard to Make A Statement

Woodard alleges that the Death Penalty Clemency Procedures violate his right against self-incrimination.

Paragraph C.1. of the Procedures provides in pertinent part:

The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that *if he requests in writing*, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. (emphasis added) Clearly Woodard's claim of compelled self-incrimination is not supported by the words of the

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[1]It is clear from the complaint that Woodard did in fact consult with counsel prior to electing not to submit to a Parole Board interview in support of clemency.

Procedures and is patently frivolous.[2]

Ohio Death Penalty Procedures Do Not Result In Cruel and Unusual Punishment

> [Clemency] is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.

Herrera v. Collins, supra at 867, quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-161 (1833). Clemency or the denial thereof does not impose punishment. A decision on clemency is a decision on whether or not relief should be granted from lawfully imposed punishment.[3]

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[2]There is no right to remain silent after a final judgment of conviction is affirmed on direct appeal or immunity is conferred. *See Reina v. United States*, 364 U.S.507, 513 (1960). However, the defendants respectfully submit that this issue is not before the Court.

[3]The issue of capital punishment being cruel and unusual punishment is not properly before the Court in this action. The defendants note that in Section II, paragraph 2 of the complaint, Woodard specifically states that the action is not intended to affect

CONCLUSION

42 U.S.C. §1983 is intended to provide remedies for deprivations of constitutionally protected interests. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). The defendants respectfully submit that Woodard can prove no set of facts which establish a constitutional deprivation and entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

There is no right to clemency under the federal Constitution or Ohio law. *Connecticut Bd. Of Pardons v. Dumschat, supra; State ex rel. Maurer v. Sheward, supra.* Therefore, there is no right to Fourteenth Amendment due process regarding a procedure that does not involve a pre-existing right. *Jago v. Van Curen, supra.*

The Sixth Amendment right to counsel is limited to criminal proceedings. *Hannah v. Larche, supra.* The Clemency Procedures are not a part of criminal proceedings.

The Death Penalty Clemency Procedures require an inmate to request in writing to submit to an interview by the Board. Perforce, there is no violation of the right against self-incrimination.

The clemency procedures involve a consideration of the appropriateness of a gratuitous remission of lawfully imposed punishment. It is pure sophistry to allege that the review process itself is cruel or unusual punishment.

For the foregoing reasons, the defendants ask the

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his state conviction and/or sentences "including his death sentence." Nonetheless, the present state of the law is that capital punishment itself is not cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153,187 (1976).

Court to enter judgment on the pleadings in their favor and order the complaint dismissed.

[SUBSCRIPTION OMITTED IN PRINTING]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF FACTS

Plaintiff Eugene Woodard, who was sentenced to death in Ohio's electric chair, brings this case to challenge the constitutionality of Ohio procedures for determining whether he will be granted an opportunity for clemency.

He was sentenced to death on December 6, 1990.

On August 24, 1994, the Supreme Court of Ohio issued a stay of execution to permit Mr. Woodard to pursue state post-conviction relief.

On September 6, 1994, counsel for Mr. Woodard received telephone notice that the Defendants intended to conduct clemency proceedings regarding Mr. Woodard's execution. The proceedings were to be conducted pursuant to the Death Penalty Clemency Procedure promulgated by the Adult Parole Authority ("APA"), but that Mr. Woodard would not:

1. be permitted to attend the hearing;

2. be represented by counsel;

3. present witnesses or evidence on his behalf;

4. know the evidence against a granting of clemency;

5. nor would his counsel be permitted to attend the hearing or in any way participate in the clemency process.

Counsel was further informed that the APA would interview Mr. Woodard on September 9, 1994.

On September 7, 1994, counsel for Mr. Woodard requested the right to attend any hearing or interview conducted relating to Mr. Woodard's clemency hearing and a continuance of the hearing to permit a thorough investigation of the matter. Further, counsel noted that there was ample time for a careful treatment of Mr. Woodard's case for clemency because a stay of execution had been ordered by the Supreme Court of Ohio. The Defendants never responded to this request.

On September 14, 1994, Mr. Woodard initiated the present action alleging a violation of his constitutional rights and seeking relief under 42 U.S.C. Section 1983.

On September 15, 1994, the parties agreed to stay the clemency proceedings pending the instant action.

On November 29, 1994, a preliminary pretrial conference was held before Magistrate Judge Terence Kemp.

On December 7, 1994, Mr. Woodard requested discovery of policies, procedures and documents relating to

the clemency process.

On January 9, 1995, the Defendants moved to dismiss the complaint for failure to state a claim for which relief could be granted.

On January 9, 1995, the Defendants filed a motion for a protective order prohibiting discovery.

ARGUMENT

I. CLAIM FOR RELIEF

A. INTRODUCTION

Defendants move this Court for a judgment on the pleadings claiming that Mr. Woodard "cannot establish any facts to support his claims." (Def. Motion p. 4.) The Defendants' motion which is, in effect, a motion to dismiss for failure to state a claim, should be denied because the Plaintiff has pleaded sufficient facts to allege a claim for which relief can be granted.

Mr. Woodard's complaint alleges that the clemency process in Ohio deprives him of his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment right against self-incrimination, right to counsel, right to be free of cruel and unusual punishment, and the rights to due process and equal protection of the law. Specifically, Mr. Woodard claims the right to have an attorney present during questioning, be represented by counsel at any clemency hearing, to a meaningful clemency hearing, and to meaningful participation in the clemency process. The State of Ohio has chosen to make clemency available and to provide a clemency process. Having done so, the clemency process must comply with the protections of the Due Process and Equal Protection Clauses.

McGee v. Arizona State Board of Pardons and Paroles, 92 Ariz. 317, 376 P.2d 779 (1962). *See also, Evitts v. Lucey*, 469 U.S. 387 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gideon; Brown v. Bd. of Education*, 347 U.S. 483 (1953). These federal constitutional rights vest with Mr. Woodard directly from the Constitution, laws, and policies of Ohio. Therefore, the complaint alleges a claim for which relief can be granted.

B. STATE CREATED RIGHT

The Defendants are required to engage in a thorough investigation into the propriety of granting clemency, Ohio Rev. Code Sec. 2967.07; Death Penalty Clemency Procedure; and yet Mr. Woodard is not permitted to attend the hearing or be represented by counsel. At no time in the process at issue in this case would counsel for Mr. Woodard be permitted to participate, present evidence or witnesses, or clarify, rebut or confront witnesses or evidence against Mr. Woodard. Death Penalty Clemency Procedure, Section IV(C)(2) and (D)(3). This denial destroys the reliability of clemency proceedings and prevents the thorough investigation and factual development required by Ohio laws and procedure.

Mr. Woodard is presently represented by counsel and is pursuing state post-conviction relief challenging the constitutionality of his convictions and sentences and has not waived the presence or assistance of counsel. State post-conviction proceedings are civil lawsuits between an inmate and the State of Ohio. *State v. Milanovich*, 42 Ohio St.2d 46 (1975). As part of the Death Penalty Clemency Procedure the Defendants intend to interview Mr. Woodard about the facts, nature and circumstances of the crime for which he was convicted. Ohio Rev. Code Sec. 2967.07; Death

Penalty Clemency Procedure, Section IV(C)(2). These matters are the subject of the petition for state post-conviction relief and are being contested by Mr. Woodard. Counsel for Mr. Woodard is prohibited from attending the APA's proposed interview. Death Penalty Clemency Procedure, Section IV(C)(2). Requiring Mr. Woodard to discuss the case with the State of Ohio without the presence of counsel violates the most basic premise of due process, as well as his right to counsel and his right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); Code of Professional Responsibility, DR 7-104.

In the instant action, Mr. Woodard requests that the State comply with minimal Constitutional requirements in conducting his clemency hearing. Mr. Woodard is not seeking a judicial determination of his right to clemency but rather, is seeking due process of law in any clemency hearing.

C. *DUMSCHAT* IS NOT DISPOSITIVE

The Defendants' reliance upon *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), to claim that Mr. Woodard is not entitled to clemency, and therefore has no constitutional protections throughout the clemency process, is misplaced for numerous reasons. First, the Defendants argue that *Dumschat* eliminated any claim for due process in clemency decisions. In *Dumschat*, however, the Supreme Court held only that there was no right to clemency created by the Connecticut statutes. *Contra, Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1976). What the Court did not address was whether a person sentenced to death has an expectation, based on state law, policy, and historical practice, of a thorough investigation into the facts and evidence in a clemency hearing granted by the state.

That is the issue before this Court. Although a state may not be required to do an act, once it chooses to act, the action must comply with the protections of the Due Process and Equal Protection Clauses. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gideon; Brown v. Bd. of Education*, 347 U.S. 483 (1953).

Second, the inmates in *Dumschat* sought written reports and rationales for the denial of parole. The Connecticut operating statute did not require any reasons or rationale for the denial of parole and therefore no written justification for denial was required. However, Ohio Rev. Code Sec. 2967.07 dictates that the APA "shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefore and the records or minutes relating to the case." Since Ohio law mandates a written report, the rationale for the granting or denial of clemency must be provided in that manner.

Third, Mr. Woodard is seeking due process protection of a "life" interest, namely his own life, as well as "liberty" and "property" interests. The inmates of *Dumschat* were only seeking due process protection of a "liberty" interest. Of all interests protected by due process, clearly a "life" interest is deserving of the greatest protection. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

Fourth, Mr. Woodard's right is not a unilateral expectation, rather, it is a right created by the statutes, policies, and historical practice of the State of Ohio. Ohio Rev. Code Sec. 2967.07 dictates that the APA "*shall*" conduct a "thorough investigation into the propriety of granting a pardon, commutation, or reprieve." Statutes can

create a due process right if policies, procedures, criteria or other duties are mandated. *Dumschat*, 452 U.S. at 465, 466; *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974). In this respect, the instant case is more akin to *Greenholtz* than *Dumschat*. In *Greenholtz*, once a final hearing was granted, the statute provided for notice to the inmate, presentation of evidence and witnesses, representation by counsel, and a written report. The Supreme Court held that these procedures met the minimum Constitutional requirements for due process. *Greenholtz*, 442 U.S. at 16. Conversely, the statute at issue in *Dumschat* vested discretion with the executive agency in deciding whether to grant or deny parole. Unlike Ohio, there was no requirement for a thorough investigation, hearing, notice, representation, presentation of evidence or witnesses, or written report. Under those circumstances, no due process protections were necessary. As in *Greenholtz*, the mandates of Ohio law and procedure establish Mr. Woodard's interest in meaningful participation in the clemency process.

Fifth, unlike the parole policy in *Dumschat*, the Ohio policy adopted by the APA imposes substantial duties on the APA. These duties and obligations vest a due process right with Mr. Woodard. *Evitts*. The APA is required to:

1. investigate "the details of the prisoner's offense, prior record and other relevant information," Death Penalty Clemency Procedure Section IV(B)(2);

2. send notice of any hearing to the "sentencing court, prosecutor, and the victim's

family or representative," Death Penalty Clemency Procedure Section IV(B)(3);

3. send notice to the inmate and his or her counsel, Death Penalty Clemency Procedure, Section IV(B)(4);

4. "consider all relevant information," Death Penalty Clemency Procedure, Section IV(E)(1);

5. transcribe minutes of the hearing, Death Penalty Clemency Procedure, Section IV(E)(2); and

6. transmit a written report to the governor, Death Penalty Clemency Procedure, Section IV(B)(5) and (E)(3).

As specifically recognized in *Dumschat*, a constitutional due process claim arises from the "statutes or other rules defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465.

Finally, *Dumschat* does not prohibit a "liberty" interest from vesting with Mr. Woodard. As recognized in *Dumschat*, *Greenholtz*, and *Wolff*, a historical granting of rights may create a legitimate expectation of process warranting protection by the Due Process and Equal Protection Clauses. Clemency is both a historic remedy and the failsafe of our system of criminal jurisprudence. *Herrera*

v. Collins, ____ U.S. ____, 113 S.Ct. 853, 866 (1993). In fact, the founding fathers believed that a criminal justice system devoid of clemency would indeed be cruel. Federalist No. 74 (Alexander Hamilton). It is Mr. Woodard's contention that Ohio has historically provided meaningful review and participation by the condemned in the clemency process. Mr. Woodard has sought discovery of information and materials to support such a historical claim but the Defendants have refused to release the information and seek to stay discovery indefinitely. It is premature at this juncture to eliminate this claim.

II. DUE PROCESS REQUIREMENTS

As is oft repeated, death is qualitatively different from all other sentences and more process is due when the interest to be forfeited is a life interest. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearings appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950). One of the fundamental rights inherent in our system of justice is the right to notice and the opportunity to be heard. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950); *Re Oliver*, 333 U.S. 257, 273 (1947); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *overruled on other grounds; Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

The concept of due process is not a technical concept of legal rules, but rather a flexible determination of rights and privileges required in a particular situation. *Mathews v.*

Eldridge, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Since due process is flexible, the requirements must be determined in light of the facts of the specific situation at bar. *Mathews*, 408 U.S. at 335; *Goldberg*, 397 U.S. at 263-271. Specifically, three factors must be evaluated and balanced against one another. First, the private interest must be identified. Mr. Woodard claims a life, liberty, and property interest in his own life and the meaningful and thorough clemency process. The Ohio Revised Code and the Death Penalty Clemency Procedure protect this interest and process. The interest in life is the greatest interest an individual can have and must be given the greatest protections possible. *Woodson.*

Second, the risk of error in depriving Mr. Woodard of his life, liberty, and property rights must be examined. *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 263-271. As the Clemency Procedure stands now, Mr. Woodard is not able to attend the hearing, be represented by counsel at the hearing, present witnesses or other evidence at the hearing, monitor, confront, or even know the witnesses and evidence against him, correct any factual inaccuracies presented to the APA or in any other way participate in a meaningful manner in a hearing held to determine whether he should live or die. An error at the clemency stage of the death penalty process is final and irreversible. *Herrera v. Collins*, ____ U.S. ____, 113 S.Ct. 853 (1993). The procedure employed by Ohio in no way insures that the information needed to make a reasoned and sound decision will be presented to the APA. The risk of error is so extreme as to require *at least* the same measure of process due parole revocation hearings, *Morrissey*, denial of public assistance benefits, *Goldberg*, unemployment compensation benefits, *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), or the denial of social security

benefits, *Mathews*. Moreover, due to the irreversibility and finality of an execution, *more* process is due than in other criminal or civil matters. *Woodson*.

Third, the Government's interest must be considered and this interest also militates in favor of due process protections being provided. *Mathews*, 424 U.S. at 335; *Goldberg*, 397 U.S. at 263-271. Although the government has an interest in the fair imposition of its criminal penalties, the state has no legitimate interest in executing an innocent man, or in a rush to execution depriving Mr. Woodard of the due process protection of the Fourteenth Amendment. Equally so, the state has no legitimate interest in executing Mr. Woodard if he is deserving of clemency. Rather, the state has an interest in ensuring that the clemency process guarantees the due process protections in order to avoid the arbitrary and capricious imposition of the death sentence. *Herrera, Furman v. Georgia*, 408 U.S. 238 (1972). Ohio Rev. Code Sec. 2967.07 and the Death Penalty Clemency Procedure recognize this state interest by requiring a thorough investigation into the matter and a written report containing the justifications for the recommendation submitted by the reviewing body.

The interest of Mr. Woodard in receiving, and the State in providing due process in the clemency procedure is clearly greater than any interest in denying due process and thorough review to a person sentenced to death. *See Herrera*. Therefore, the protections of the Due Process Clause vest with Mr. Woodard.

III. *MAURER* IS NOT DISPOSITIVE

The Defendant's reliance on *State ex re. Maurer v. Sheward*, 71 Ohio St. 3d 513 (1994), is misplaced. *Maurer* addressed the ability of the General Assembly to impose

limitations on the governor's decisions to grant commutations of sentences. As correctly pointed out by the Defendants, the General Assembly has no authority to "prescribe substantive regulations concerning the Governor's discretion in the use of the clemency power." *Id.* at 519-520. However, the situation in the case at bar is different from that in *Maurer* for three reasons. First, the Death Penalty Clemency Procedure is a creation of the executive branch, not the legislative branch. Through its promulgation, the governor created a procedure to assist in the exercise of his discretionary power. Although there is no requirement in the absence of a procedure, once created, the procedure must abide by the constraints of the Due Process Clause of the Fourteenth Amendment. *Evitts; Mathews; Morrissey; Gideon; Brown.*

To argue that the governor possesses unfettered discretion in adopting a clemency policy is blatantly incorrect. It is indisputable that the governor could not adopt a policy whereby white defendants were granted clemency but African-American defendants were denied clemency. Such a policy would be such an absolute violation of due process, equal protections and the system of justice in the United States as to be preposterous. That policy would clearly be subject to judicial review, regulation and, rightfully so, condemnation. The instant case presents a similar situation whereby the procedure adopted by the governor is subject to judicial review as applied.

Second, the requirements of Ohio Rev. Code Sec. 2967.07 at issue in this case go to procedural matters and protections, not substantive regulation. *Maurer* prevents substantive regulation but not procedural. *Id.* at 519-520. The thorough investigation and written report requirements do not infringe in any way upon the discretion of the governor but merely provide mechanism for the sound

exercise of that discretion.

Third, *Maurer* specifically recognized that the granting of pardons is subject to legislative regulation. *Maurer* at slip. op. 519, 525. Based upon, or in spite of, the APA recommendation and report, the governor can grant or deny a full pardon or a partial pardon. But the governor is constrained by the procedures imposed by the General Assembly. In the instant case, Mr. Woodard is eligible for the full panoply of clemency: full pardon, partial pardon, reprieve, or commutation. As this aspect of the clemency process is subject to legislative regulation, the procedural requirements of Ohio Rev. Code Sec. 2967.07 must be satisfied before the governor can consider granting a pardon to Mr. Woodard, or any death sentenced individual. These procedural requirements mandate that Mr. Woodard be afforded due process. *Evitts; Mathews; Morrissey; Gideon; Brown.*

CONCLUSION

The State of Ohio created the Death Penalty Clemency Procedure, enacted statutes guiding the clemency process. These voluntary actions by the State vested due process protections with Mr. Woodard. *Evitts*. The Defendants now intend to engage in a constitutional rights bait and switch by granting a hearing and clemency process and then denying any opportunity for meaningful participation in the clemency process. The statutes, policies, and procedures adopted by the State of Ohio grant an unambiguous right. However, the State is now attempting to grant only the illusion of that right. The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States mandates more than the illusion of rights. For these reasons, Mr. Woodard respectfully requests this Court deny the

Defendants' motion for judgment on the pleadings and allow the case to proceed for a judgment on its merits.

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UNITED STATES DISTRICT JUDGE
IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Eugene Woodard,	:	
Plaintiff,	:	
v.	:	Case No. C2-94-892
Ohio Adult Parole Authority, et al.,	:	JUDGE KINNEARY
Defendants.	:	

REPORT AND RECOMMENDATION

(Found in the Appendix to the Petition for Certiorari at A-43.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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PLAINTIFF'S OBJECTIONS TO
MAGISTRATE'S REPORT AND RECOMMENDATION

Pursuant to Order 91-3, Order 1(F)(6) of the local rules for this district and F.R.C.P. 72 Plaintiff Eugene Woodard, by and through counsel, hereby objects to the magistrate's report and recommendation filed in this Court on June 20, 1995.

Plaintiff objects to the Magistrate's proposed findings, recommendations, and report holding that: (1) "no right to clemency has been created by the state and procedural due process protections are not triggered;" (2) "there is no right to clemency which is so vital that 'neither liberty nor justice would exist if [it] were sacrificed'" and there is no substantive due process claim; (3) the Fifth Amendment to the Constitution of the United States is not implicated; (4) the Sixth Amendment to the Constitution of the United States is not implicated; (5) the Eighth Amendment to the Constitution of the United States is not implicated; and (6) the failure of the Magistrate to address the Plaintiff's claim that his rights under the Ninth Amendment to the Constitution of the United States were violated.

A Memorandum setting forth the basis for the objections is attached and incorporated into the Objections to the Magistrate's Report and Recommendation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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MEMORANDUM IN SUPPORT

1. MR. WOODARD POSSESSES A PROCEDURAL DUE PROCESS RIGHT TO PARTICIPATE IN A FAIR AND MEANINGFUL MANNER IN THE CLEMENCY PROCESS ESTABLISHED BY THE STATE OF OHIO.

The magistrate's report concluded that Mr. Woodard was not entitled to procedural due process protections because the State did not create a right to clemency. This is not the issue before the Court. Mr. Woodard claims a right to procedural due process in the Death Penalty Clemency Procedure ("Clemency Procedure") established and adopted by the Ohio Adult Parole Authority ("OAPA"). Mr. Woodard is not claiming a right to clemency but rather is claiming a right to meaningfully participate in the decision making process established by the State. The State of Ohio has chosen to make clemency available and to provide a clemency process. Ohio Rev. Code Sec. 2967.07; Death Penalty Clemency Procedure. Having done so, the clemency process must comply with the protections of the Due Process and Equal Protection Clauses. *McGee v. Arizona State Board of Pardons and Paroles*, 92 Ariz. 317, 376 P.2d 779

(1962). *See also, Evitts v. Lucey*, 469 U.S. 387 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brown v. Bd. of Education*, 347 U.S. 483 (1953). These federal constitutional rights best with Mr. Woodard directly from the Constitution, laws, and polices of Ohio. Therefore, the complaint alleges a claim for which relief can be granted.

In the instant action, Mr. Woodard requests that the State comply with minimal Constitutional requirements in conducting his clemency hearing. To reiterate, Mr. Woodard is not seeking a judicial determination of his right to clemency but rather, is seeking due process of law in clemency proceedings afforded to him. The due process violation here is that the Governor has set up a clemency procedure which denies death-sentenced persons such as Mr. Woodard a meaningful opportunity to participate and be heard.

2. THE GOVERNOR OF OHIO DOES NOT POSSESS U N F E T T E R E D DISCRETION.

The Magistrate's report concluded that the governor of Ohio has almost unfettered discretion in making a clemency decision. However, the reliance on *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513 (1994), is misplaced. *Maurer* addressed the ability of the General Assembly to impose limitations on the governor's decisions to grant commutations of sentences. As correctly pointed out by Defendants, the General Assembly has no authority to "prescribe substantive regulations concerning the Governor's discretion in the use of the clemency power." *Id.* at 519-520. However, the situation in the case at bar is different

from that in *Maurer* for three reasons. First, the Death Penalty Clemency Procedure is a creation of the executive branch, not the legislative branch. Through its promulgation, the governor created a procedure to assist in the exercise of his discretionary power. Although there is no requirement in the absence of a procedure, once created, the procedure must abide by the constraints of the Due Process Clause of the Fourteenth Amendment. *Evitts; Mathews; Morrissey; Gideon; Brown.*

To argue that the governor possesses unfettered discretion in adopting a clemency policy is blatantly incorrect. It is indisputable that the governor could not adopt a policy whereby white defendants were granted clemency but African-American defendants were denied clemency. Such a policy would constitute an absolute violation of the due process, equal protection and the system of justice in the United States. That policy would clearly be subject to judicial review, regulation and, rightfully so, condemnation. The instant case presents a similar situation whereby the procedure adopted by the governor is subject to judicial review as applied.

Second, the requirements of Ohio Rev. Code Sec. 2967.07 at issue in this case go to procedural matters and protections, not substantive regulation. *Maurer* prevents substantive regulation but not procedural. *Id.* at 519-520. The thorough investigation and written report requirements do not infringe in any way upon the discretion of the governor but merely provide a mechanism for the sound exercise of that discretion.

Third, *Maurer* specifically recognized that the granting of *pardons* is subject to legislative regulation. *Maurer*, at 519, 525. Based upon, or in spite of, the OAPA recommendation and report, the governor can grant or deny

a full pardon or a partial pardon. But the governor is constrained by the procedures imposed by the General Assembly. In the instant case, Mr. Woodard is eligible for the full panoply of clemency: full pardon, partial pardon, reprieve, or commutation. As a *pardon* is subject to legislative regulations, the procedural requirements of Ohio Rev. Code Sec. 2967.07 must be satisfied before the governor can consider granting a pardon to Mr. Woodard, or any death sentenced individual. These procedural requirements mandate that Mr. Woodard be afforded due process. *Evitts; Mathews; Morrissey; Gideon; Brown.*

3. MR. WOODARD POSSESSES A SUBSTANTIVE DUE PROCESS RIGHT TO APPLY FOR A CLEMENCY.

The Magistrate's report concluded that Mr. Woodard raised no substantive due process claim because there is no right to clemency. Once again, the Magistrate addressed the issue as a claim for clemency. However, Mr. Woodard has never claimed that he has a right to clemency, rather he has claimed a right to the clemency hearing established by the Clemency Procedure. Clemency is both a historic remedy and the fail-safe of our system of criminal jurisprudence. *Herrera v. Collins,* ___ U.S. ____, 113 S.Ct. 853, 866 (1993). In fact, the founding fathers believed that a criminal justice system devoid of clemency would indeed be cruel. Federalist No. 74 (Alexander Hamilton). Mr. Woodard contended that Ohio has historically provided meaningful review and participation by the condemned in the clemency process. Therefore, the State of Ohio has indeed created a substantive due process right in the clemency process.

4. THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROVIDE SUBSTANTIVE AND PROCEDURAL PROTECTIONS TO MR. WOODARD.

The Magistrate's report concluded that the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States were not implicated because the decision to participate in the clemency process is voluntary. However, the voluntariness of the decision creates an intolerable constitutional dilemma. *Simmons v. United States*, 390 U.S. 377, 394 (1968). The Hobson's choice forced upon Mr. Woodard is whether to remain silent on the ongoing litigation for his life or discuss the merits of his claims with the State in an attempt to win clemency. (Fifth Amendment Right). Whether to maintain the attorney-client privilege and secure his right to counsel or discuss his situation and case, without the benefit of counsel, with those seeking to execute him. (Sixth Amendment Right). Whether to continue to challenge his death sentence or attempt to win clemency in the current political climate. (Eighth and Ninth Amendment Rights). Again, the underlying right is not the right to clemency, but the right to be involved in the decision making process. The State has created a due process right in the Clemency Procedure and therefore Mr. Woodard cannot be forced to chose one constitutional right to the detriment of another.

5. MR. WOODARD IS ENTITLED TO FURTHER DISCOVERY.

The Magistrate recommended that the Defendant's motion to stay discovery be dismissed as moot. In order to reach this decision, the Magistrate made a judgment as to the value of the evidence *not* disclosed by the Defendants. The failure of the Defendants to meaningfully comply with discovery prevented Mr. Woodard from fully developing and presenting an analysis of the historic right to due process in clemency hearings. The Magistrate's decision that the withheld evidence could provide no support for Mr. Woodard's claims is without foundation in law or fact and should be rejected. Only by engaging in full discovery can the true nature of the State's Clemency Procedure be explored.

6. CONCLUSION

For the above stated reasons, Mr. Woodard asks that the Magistrate's Report and Recommendation be rejected, that this Court order the Defendants to comply with the discovery orders of this Court, and that Mr. Woodard's claims be permitted to proceed to a decision on the merits.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,

Plaintiff,

v. Case No. C-2-94-892

OHIO ADULT PAROLE
AUTHORITY, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court ADOPTS the Report and Recommendation entered by June 20, 1995. The Defendants' motion for judgment on the pleadings is GRANTED. This case is hereby terminated.

KENNETH J. MURPHY, CLERK
(By) W.J. Harrison, Deputy Clerk

DATE: September 8, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EUGENE WOODARD,

Plaintiff,

v. Case No. C-2-94-892

OHIO ADULT PAROLE AUTHORITY, et al.,

Defendants.

OPINION AND ORDER

(Found in the Appendix to the Petition for Certiorari at A-41.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[CAPTION OMITTED IN PRINTING]

NOTICE OF APPEAL

Notice is hereby given that *EUGENE WOODARD* appeals to the United States Court of Appeals for the Sixth Circuit from the (*X*) Judgment (___) Order (____) Other (specify) _____ entered in this action on *September 8, 1995*.
(Date)

[SUBSCRIPTION OMITTED IN PRINTING]

Date: *October 10, 1995*

No. 95-4099

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUGENE WOODARD,
Plaintiff-Appellant,

v.

OHIO ADULT PAROLE AUTHORITY, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed March 3, 1997

OPINION

(Found in the Appendix to the Petition for Certiorari at A-1.)

Respectfully submitted,

BETTY D. MONTGOMERY
Ohio Attorney General

JEFFREY S. SUTTON
State Solicitor of Ohio
(*Counsel of Record*)
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
State Office Tower
30 East Broad Street
17th Floor
Columbus, Ohio 43215
(614) 728-7055

Counsel for Petitioner

DAVID H. BODIKER
Ohio Public Defender

RICHARD VICKERS
Post-Conviction Supervisor,
Death Penalty Division
MICHAEL BENZA
Assistant State Public Defender
(Counsel of Record)

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394

Counsel for Respondent

Date: August 21, 1997

Supreme Court, U.S.
FILED
AUG 21 1997
CLERK

(6)

No. 96-1769

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

BETTY D. MONTGOMERY
Attorney General

WILLIAM A. KLATT
First Assistant Attorney General
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

53 pp

CAPITAL CASE
VALIDITY OF CLEMENCY PROCEDURES

QUESTIONS PRESENTED

I.

WHETHER STATE CLEMENCY PROCEDURES MAY BE REVIEWED UNDER THE DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT ESTABLISHED BY *EVITTS V. LUCEY*, 469 U.S. 387 (1985), OR WHETHER *CONNECTICUT BOARD OF PARDONS V. DUMSCHAT*, 452 U.S. 458 (1981) CONTAINS THE SOLE DUE PROCESS LIMITATIONS ON THOSE PROCEDURES.

II.

WHETHER INMATE INTERVIEWS, HELD VOLUNTARILY AT THE REQUEST OF THE INMATE AS PART OF A STATE CLEMENCY PROCEDURE, IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

LIST OF PARTIES

Petitioners are the Ohio Adult Parole Authority; Jill Goldhart, Chief of the Adult Parole Authority; Margarette Ghee, Chairwoman of the Ohio Adult Parole Board; Walter Echols; Raymond E. Capots; William E. Hudson; Robert E. Smith; Richard Gooch; Gloria Andrews; Jay R. Denton; and Constance M. Upper.

Respondent is Eugene Woodard.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 96-1769

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,
v.
EUGENE WOODARD,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 107 F.3d 1178. Petition Appendix ("Pet. App. ___") 1a. The opinion of the district court is unreported. *Id.* at 41a. The magistrate judge's report and recommendation is unreported. *Id.* at 43a.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1997. *Id.* at 1a. The petition for writ of certiorari was filed on May 5, 1997, and was granted on June 27, 1997. 117 S. Ct. 2507. Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions, U.S. Const. Amends. V and XIV, Ohio Const. Art. III, Section 11, and the relevant statutory and administrative provisions, O.R.C. 2967.07, Ohio Death Penalty Clemency Procedure, are reproduced in the appendix to this brief.

STATEMENT

This case stems from a challenge to the Ohio Governor's clemency power under the due process clause of the Fourteenth Amendment and the self-incrimination clause of the Fifth and Fourteenth Amendments. The procedure at issue commences a clemency investigation, and the optional inmate interview that goes with it, whenever inmates fail to obtain a stay of execution more than 45 days before their execution date. In reviewing this practice, it is important briefly to place the procedure in the context of clemency law in general and Ohio's clemency law in particular.

A. Clemency Law.

Clemency is not a recent innovation. The power to extend mercy to those convicted of a criminal offense has been a feature of criminal law for as long as western civilization has existed. The potential for clemency existed under Greek law, *See* United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 8-11 (1939), Roman law, *see id.* at 11-13, as well as English common law, *see Herrera v. Collins*, 506 U.S. 390, 412 (1993). And it has existed in this country since the founding under federal law, U.S. Const. Art. II, §2, and under the laws of all American States, *see* United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 89-90 (1939).

The clemency power has long been an executive prerogative. In England, the power was a royal prerogative tracing back to the 700's. *See United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) ("this power has been exercised from time immemorial by the executive of that nation whose language is our language"); *Herrera*, 506 U.S. at 412. In this country, the power likewise was placed in the executive branch at the federal and State level. The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." Art. II, §2. The States followed suit in crafting their own constitutions, placing the clemency power in the Governor or in separate clemency boards. *See* United States Dept. of Justice, 3 Attorney General's Survey of Release Procedures 89-90 (1939); Appendix ("A- __") 8-10.

The authority to grant clemency covers several forms of leniency. It includes the power to grant reprieves, which temporarily postpone the execution of a sentence so that the inmate may seek a reduction in punishment. It includes the power to commute sentences from a higher punishment to a lesser one. And it includes the power to pardon a criminal offense altogether by permanently canceling a sentence. *See generally Biddle v. Perovich*, 274 U.S. 480, 486-87 (1927); Nat'l Governor's Ass'n Center for Policy Research, Guide to Executive Clemency Among the American States 4-5 (1988).

One of the hallmarks of the clemency power, whether at English common law or in this country today, has been the discretion the executive has in exercising it. At common law, it was said that "the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit." *Schick v. Reed*, 419 U.S. 256, 261 (1974) (citing 2 W. Hawkins, Pleas of the Crown 557 (6th ed. 1787)). In describing the President's clemency power, Alexander Hamilton wrote that "[h]umanity and good

policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed." The Federalist Papers, No. 74 (Cooke ed. 1961) 500-01. Similar discretion exists at the State level. *See* A-8-10.

B. Ohio Clemency Law.

The Ohio Constitution places the power to grant clemency in the executive branch. It gives the Governor power to grant pardons, reprieves and commutations "upon such conditions as he may think proper," except in cases of treason and impeachment. Art. III, §11; A-1. While the Ohio legislature may establish procedural rules regarding clemency applications, it may not curtail the Governor's ultimate decisionmaking authority over whether to grant clemency. *See* 1 Report of the Debates and Proceedings of the Convention for the revision of the Constitution of the State of Ohio 1850-1851 (1851) 306-307; *State v. Morris*, 378 N.E.2d 708, 714 (Ohio 1978). Nor has the Governor's discretion in this area ever been exposed to judicial oversight under Ohio law. *See State ex rel. Whiteman v. Chase*, 5 Ohio State 528, 535 (1856); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994).

Consistent with its authority to regulate the procedure for seeking clemency, the Ohio General Assembly has delegated several information-gathering responsibilities to the Ohio adult parole board, an agency within the Ohio Department of Rehabilitation and Corrections. O. R.C. §5149.02. All clemency applicants must file their requests in writing with the parole board. O.R.C. §2967.07; A-2. Upon the filing of an application or otherwise at the direction of the Governor, the board must then conduct a "thorough investigation" of each clemency applicant. *Id.* After completing its investigation, the board must file a report with

the Governor explaining its recommendation for granting or denying the application. *Id.* None of the legislature's clemency procedures, however, places any limit on the Governor's ultimate discretion to deny a clemency application.

C. Ohio's 1994 Modification To Its Clemency Procedure.

In 1994, a death row inmate failed to obtain a stay of execution until just days before his scheduled execution date. *See Collins v. Byrd*, 510 U.S. 1185 (1994). Because the inmate was a first federal habeas petitioner and because clemency review traditionally did not start before that time, the Ohio Governor faced the prospect of receiving an emergency clemency request from an inmate about whom he had little information. The eleventh-hour nature of the proceedings prompted the Governor to modify the review process. J.A. 8.

Under the new procedure, clemency review begins immediately after the inmates complete their direct review and the Ohio Supreme Court sets an execution date. *See* Ohio Death Penalty Clemency Procedure, VI(B)(1) (attached to appendix). At that point, the parole board begins collecting information about the prisoner's offense, prior record and background. *Id.* at VI(B)(2). In the event the inmate fails to stay the execution date more than 45 days beforehand, the board schedules a clemency review hearing that must be completed 21 days prior to the scheduled execution date. *Id.* at VI(B)(3) Once such a hearing has been scheduled, Ohio requires the clemency review to be completed and a recommendation to be made even though a court later stays the execution. *Id.* at VI(B)(5).

The notice of this procedure explains to the inmates that they may obtain a clemency interview without counsel if they request it in writing. *See Id.* at VI (C)(2). If a request is made, one or more parole board members interviews the inmate before the board conducts a hearing on the application. *Id.* at VI (C)(1) & (E)(1). After the hearing the board makes a clemency recommendation, which it communicates to the Governor's office. *Id.* at VI (E)(2) & (3). In the event new information becomes available after the parole board's initial recommendation, the board may supply it to the Governor, the board may in its discretion hold another hearing, or the board may alter its initial recommendation. *Id.* at VI (G).

D. The Underlying Proceedings.

Ohio's new clemency procedure became relevant to respondent, Eugene Woodard, due to a series of crimes he committed on the evening of June 20, 1990. That night he and three other men stole a car and intentionally drove it into another vehicle in order to rob the occupant. After the collision, Mr. Woodard approached the car and shot Mani Akram, a 19 year old college student, in the chest with a handgun. *State v. Woodard*, 623 N.E.2d 75, 76 (Ohio 1993). Mr. Akram was dumped from the car and left for dead (he later died from the wound), after which Mr. Woodard and his cohorts stripped and torched the vehicle. In later arguing over who should get the stolen goods, Mr. Woodard insisted "I should get the radio. I'm the one that shot the guy." *Id.* at 76.

On the basis of this and other evidence, an Ohio jury found Mr. Woodard guilty of several crimes, including aggravated murder committed during the commission of a felony. The jury recommended the death penalty, and the trial court accepted its recommendation. The state court of

appeals and the Ohio Supreme Court affirmed, and this Court denied certiorari. *See State v. Woodard*, 1992 WL 84888 (Ohio App. 8th Dist. Apr. 23, 1992); *State v. Woodard*, 623 N.E.2d 75 (Ohio 1993); *Woodard v. Ohio*, 512 U.S. 1246 (1994).

On July 18, 1994, after this Court denied Mr. Woodard's certiorari petition and in accordance with its customary procedures, the Ohio Supreme Court set Mr. Woodard's execution date for October 7, 1994. Mr. Woodard waited until August 16, 1994 to seek a stay of execution, which the Ohio Supreme Court granted on August 24, 1994. Because Mr. Woodard did not obtain a stay more than 45 days before his execution date, his clemency investigation commenced.

On September 6, 1994, the parole board notified counsel for Mr. Woodard about the clemency process and informed him that he could obtain a clemency interview if he wished on September 9, 1994. J.A. 4. The board also notified Mr. Woodard that his clemency hearing would be scheduled for September 16, 1994, twenty one days before his scheduled execution date. J.A. 4.

On September 14, 1994, Mr. Woodard filed this complaint. J.A. 2. He alleged that the new clemency procedure denied him due process, equal protection, as well as the right to remain silent, to be represented by counsel, and to be free of cruel and unusual punishment. On September 16, 1994, the parties entered into a consent decree postponing the clemency review and agreeing that it would not be rescheduled during the pendency of this suit without 30 days notice to the district court and counsel. J.A. 21. Mr. Woodard was never interviewed. The State filed an answer and then a motion for judgment on the pleadings. J.A. 27. On June 20, 1995, the magistrate judge issued a report and

recommendation granting the State judgment on the pleadings. Pet. App. 43a. The district court agreed with the report and granted the State's motion. *Id.* at 41a.

The Sixth Circuit reversed. Pet. App. 1a. It first acknowledged that Mr. Woodard could not establish a protected life or liberty interest in the clemency procedure itself, relying on *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981). Pet. App. 4a. But the court then held that clemency played a part in Ohio's overall scheme of prosecution and punishment, and concluded that the clemency procedure therefore had to be reviewed under a separate "strand" of due process recognized in *Evitts v. Lucey*, 469 U.S. 387 (1985) (due process guarantees criminal defendant the right to effective counsel on first appeal of right). Pet. App. 12a. Next, the court found that the uncounseled clemency interview seemed to place an unconstitutional condition on Mr. Woodard's Fifth and Fourteenth Amendment privilege against self-incrimination. *Id.* at 19a. The court denied all other claims as a matter of law, and remanded the case to the district court to conduct a due process review of Ohio's clemency procedure and to determine if an unconstitutional condition existed under the court of appeals' analysis.

Judge Nelson dissented. He found the due process claim indistinguishable from *Dumschat* and disagreed that *Evitts* placed separate due process limitations on Ohio's clemency procedure. Pet. App. 35a-37a. He also thought that the challenged regulation did not abridge the privilege against self-incrimination because inmates who request a clemency interview remain free to say as much or as little as they wish. *Id.* at 38a-39a.

SUMMARY OF ARGUMENT

I. Ohio's executive clemency procedure does not offend due process. Because "process is not an end in itself," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), the due process clause protects only those cognizable life, liberty or property interests established by federal or State law. In the case of individuals who have been lawfully convicted of a crime and therefore "constitutionally deprived" of their normal life or liberty interests, *Meachum v. Fano*, 427 U.S. 215, 224 (1976), due process safeguards just two interests. It limits the State's authority to infringe a freestanding federal right, such as an inmate's right not to be subjected to greater punishment than the State normally imposes for the crime. And it limits the State's authority to promise a substantial freedom to the inmate under State law, then arbitrarily take it away in a manner that imposes an "atypical and significant hardship on the inmate" in relation to the normal vicissitudes of prison life. *Sandin v. Conner*, 515 U.S. 472, 115 S.Ct. 2293, 2300 (1995); *see also Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979).

The Court has once before applied this two-step framework in rejecting the due process claim of a clemency applicant. In *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981), the claimant asserted that the board of pardons should have provided a written explanation for denying his clemency application because it granted three-fourths of all similar applications. In rejecting the claim, the Court first held that "an inmate has 'no constitutional or inherent right' to commutation of his sentence," because "the conviction, with all its procedural safeguards, has extinguished" any liberty interest in being released. *Id.* at 464 (quoting *Greenholtz*, 442 U.S. at 7). It then held that Connecticut had not created a liberty interest through its own rules or its pattern of commuting life sentences, because in

the end the board still retained discretion over whether to grant clemency. *Id.* at 466-467.

For like reasons, Ohio can weather this due process claim. As in *Dumschat*, Mr. Woodard cannot establish a freestanding federal right to clemency because no such right exists. And as in *Dumschat*, the State has not stripped the Governor of discretion to deny clemency applications for any reason or no reason at all.

Nor does *Evitts v. Lucey*, 469 U.S. 387 (1985), alter this analysis. In holding that a State's first appeal of right constitutes "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Evitts* concluded that the right to counsel on appeal includes the right to effective counsel. *Id.* at 393 (quotation omitted). But just because an appeal of right is part of the "system for finally adjudicating the guilt or innocence of a defendant" does not mean that a clemency procedure is as well. State law treats the two procedures quite differently. One procedure comes to defendants as a matter of right; the other comes to them as a matter of grace. One is part and parcel of the judicial process; the other stands apart from the judicial process. One turns on the court's view of the defendant's guilt or innocence; the other exists in spite of the court's view of the defendant's guilt or innocence.

II. Equally unavailing is Mr. Woodard's Fifth Amendment claim. The privilege against self-incrimination does not prevent Ohio from offering capital inmates clemency interviews without counsel and without immunity for what they might say. On one side of the ledger, *Simmons v. United States*, 390 U.S. 377, 394 (1968), prohibits government from forcing a defendant to surrender "one constitutional right," *e.g.*, the privilege against self-incrimination, "in order to assert another," *e.g.*, the privilege

to suppress the fruits of an unreasonable search. On the other side of the ledger, States may allow individuals to waive constitutional rights in order to accept other government benefits as long as they do not compel individuals to trade one constitutional right for another. *See, e.g., Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) (State may encourage defendant to take guilty plea even though it requires waiver of right to jury trial); *Baxter v. Palmigiano*, 425 U.S. 308 (1975) (State may force inmates to choose between testifying at disciplinary hearing or remaining silent and having an adverse inference drawn against them); *McGautha v. California*, 402 U.S. 183 (1971) (State may prevent defendant from exercising right to silence in liability phase of the trial and then testifying during the punishment phase of the trial); *Wyman v. Jones*, 400 U.S. 309 (1971) (government may condition aid on the recipient's submission to warrantless searches).

The Ohio procedure stands on the permissible side of this line. In offering capital inmates a voluntary interview without counsel, the Governor has not forced them to sacrifice one constitutional right to assert another. The right to counsel simply does not extend to a clemency proceeding. *See Ross v. Moffitt*, 417 U.S. 600 (1974). There is no constitutional right to clemency. And by making the interview voluntary, inmates are entitled to speak as little or as much they wish. No compelled self-incrimination of any kind occurs on this record.

That Ohio commences its clemency review procedure whenever inmates fail to obtain a stay more than 45 days before the execution date does not change things, even for inmates who have not completed collateral review. Any problem created by simultaneous review of clemency and post-conviction applications may be cured by promptly filing a stay application once direct review has been completed.

But even when that does not occur, inmates may always choose not to be interviewed at that point in time and exercise their right to seek an interview after completing collateral review. At all events, the Constitution does not grant defendants the unadulterated right to speak freely in one setting and then insist on silence in the other, whether the two settings are clemency and collateral review or the guilt and punishment phases of a criminal trial. *See McGautha v. California*, 402 U.S. 183 (1971).

ARGUMENT

I. OHIO'S EXECUTIVE CLEMENCY PROCEDURE DOES NOT OFFEND DUE PROCESS.

Mr. Woodard complains that Ohio's executive clemency procedure contains a series of due process shortcomings: It does not allow him or his counsel to attend the parole board's clemency hearing and present evidence on his behalf; it gives insufficient notice of an inmate's clemency interview; it permits a clemency investigation to commence before all State and federal post-conviction proceedings have been completed; and it prohibits the appearance of counsel at the clemency interview. J.A. 42-43. Mr. Woodard is mistaken in each respect, as was the Sixth Circuit in failing to reject this claim as a matter of law.

A. Due Process Does Not Restrict State Procedures For Its Own Sake, But Only To Safeguard Cognizable Life, Liberty Or Property Interests.

In demanding that no State "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment does not restrict all procedural facets of State government. Because "[p]rocess is not an end in itself," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), the clause safeguards only those cognizable "life, liberty, or property" interests established by federal or State law. *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981). Short of such a federal or State interest to which the individual has a "legitimate claim of entitlement," *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (quotation omitted), the "expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Olim*, 461 U.S. at 250 n.12.

In ascertaining whether a protectible life or liberty interest exists under federal or State law, the Court has long distinguished between those who have obeyed the law and those who have not. "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty" and therefore has a different relationship to the State from that of the law-abiding citizen. *Meachum*, 427 U.S. at 224. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948). *See also Olim*, 461 U.S. at 245.

The Court thus has recognized just two types of inmate interests that due process guards. The first arises under federal law, and asks whether the State has infringed any freestanding federal right in executing a sentence. For example, all inmates have a federal interest in not receiving a substantially different punishment from the one the State normally imposes for the crime committed. *See Sandin*, 515 U.S. 472, 115 S.Ct. 2293, 2297 n.4 (1995); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (liberty interest in refusing the involuntary administration of psychotropic drugs). The second interest arises under State law. If the States promise inmates a substantial liberty benefit, they may not arbitrarily take it away in a manner that imposes an "atypical and significant hardship on the inmate" in relation to the customary vicissitudes of prison life. *Sandin*, 115 S.Ct. at 2300. Because the "Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed," the issue here is whether the State of its own volition has chosen to create "an interest of real substance." *Id.* at 2297 n.4 (quotation omitted).

B. Due Process Does Not Restrict Discretionary State Clemency Procedures.

Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981), applied this framework in the precise context of an inmate who claimed the State's clemency procedure violated due process. At issue was the inmate's contention that the Connecticut board of pardons should have provided an explanation for denying his application to commute a life sentence in view of the Board's record of granting a high percentage of these applications.

The Court first held that "an inmate has 'no constitutional or inherent right' to commutation of his

sentence." *Id.* at 464 (quoting *Greenholtz*, 442 U.S. at 7). Any independent federal interest in freedom no longer exists, the Court emphasized, after a lawful conviction.

> The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: [Given] a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.

Id. at 464 (quoting *Greenholtz*, 442 U.S. at 7).

The Court next rejected the argument that Connecticut had created a liberty interest in clemency through its own rules and practices. While recognizing that "[a] constitutional challenge concerning executive clemency, if any, must be grounded on statutes or other rules defining the obligations of the authority charged with exercising clemency," the Court found that Connecticut had not created any such obligation. *Id.* at 465. The decisionmaker retained unfettered discretion over clemency requests, *id.* at 466-467, and thus could "deny the requested relief for any constitutionally permissible reason or for no reason at all," *id.* at 467 (Brennan, J., concurring). Neither the State's clemency procedures nor the board's track record of commuting three-fourths of all life sentences altered this bedrock feature of State clemency law. *Id.* at 466-467. In the end, the Court reasoned, a liberty interest cannot spring from a "unilateral hope" in obtaining clemency, *id.* at 465, which is all that Mr. Dumschat had in view of the uncabined discretion that the board retained over his clemency request.

In the course of its analysis, the Court observed that clemency decisions have "not traditionally been the business of the courts" and "are rarely, if ever, appropriate subjects for

judicial review," whether under the due process or any other clause. *Id.* at 464 (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)) (footnote omitted). *See also Jago v. Van Curen*, 454 U.S. 14 (1981) (per curiam). The observation is grounded in history: To our knowledge, not a single decision from this Court, or for that matter any final decision from the lower federal courts, has ever restrained a State's clemency procedures under the United States Constitution.

C. Ohio's Clemency Procedure Meets These Modest Requirements.

Ohio's clemency procedure should not be the first State law to receive such treatment. Ohio has comported in all respects with the Court's general due process instructions and with the specific teachings of *Dumschat*.

1. No Life Or Liberty Interest Exists Because The Governor Retains Complete Discretion To Deny Clemency Applications.

Neither the due process clause nor any other provision of the United States Constitution by itself creates a federal right to clemency. What the Court said in *Dumschat* remains true today: "[a]n inmate has no constitutional or inherent right to commutation of his sentence." 452 U.S. at 464 (quotation omitted). Aside from reposing power in the President to grant pardons and reprieves from federal sentences, U.S. Const. Art. II, §2, cl. 1, the federal

Constitution falls short of speaking to, to say nothing of establishing, a federal right to clemency.

Nor has Ohio created a liberty interest in clemency under State law. In Ohio, as in Connecticut under *Dumschat*, the executive branch retains broad discretion over the clemency power. The Ohio Constitution permits the clemency power to be exercised "upon such conditions as the Governor may think proper." Ohio Const., Art. III, §11. More specifically, it vests unfettered discretion in the Governor to *deny* clemency applications, while limiting the Governor's authority to *grant* clemency in cases of treason and impeachment. *See State ex rel Maurer v. Sheward*, 644 N.E.2d 369, 373-74 (Ohio 1994). The Ohio courts have been steadfast in respecting the Governor's discretion in this area, most recently rejecting a challenge to the Governor's approval of 11 clemency applications in 1990, seven of which commuted capital sentences to life sentences. *Id.*

The Ohio legislature has followed suit. It has not prescribed substantive limitations on the Governor's clemency power, and indeed lacks authority to do so. *Id.*; *State v. Morris*, 378 N.E.2d 708 (Ohio 1978); *Knapp v. Thomas*, 39 Ohio St. 377 (1883).

Nor has the Governor's office placed any restraints on its power through the passage of discretion-stripping regulations. The challenged procedure merely sets up a sensible method for preparing a clemency recommendation when an execution date is imminent and the inmate has not yet filed an application. No mandatory language of any sort impedes the Governor's discretion.

In the last analysis, Ohio's clemency law, just like the clemency law in *Dumschat*, vests the Governor with unbridled authority. And, as in *Dumschat*, this discretion

precludes the creation of a life or liberty interest that would allow Mr. Woodard to obtain the procedural protections of the due process clause. Because the "process" protected by the clause "is not an end in itself," *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983), and because no liberty interest exists in Ohio's clemency procedure (as the Sixth Circuit itself acknowledged, Pet. App. 11a), this claim fails as a matter of law. *See also Jago v. Van Curen*, 454 U.S. 14, 21 (1981) ("the [Sixth Circuit] Court of Appeals' own concession that Ohio law creates no protected 'liberty' interests require reversal of the holding of the Court of Appeals that respondent was entitled to a hearing prior to denial of his parole in June").

2. *Evitts v. Lucey* Does Not Alter This Analysis.

In reviewing Mr. Woodard's due process claim, the Sixth Circuit did not disagree with the above analysis. Just like the district court, it adhered to this approach from start to finish, acknowledging that it "was analytically correct." Pet. App. 11a; s*ee generally id.* at 4a to 11a. Instead of affirming the district court's decision at that point, however, the appellate court proceeded to articulate and then apply another "strand" of due process analysis. *Id.* at 11a. In its view, *Evitts v. Lucey*, 469 U.S. 387, 393 (1985), requires State and federal proceedings to meet a second strand of due process protection if they relate to "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant." *See* Pet. App. 12a (quotation omitted). Because the court viewed clemency as one such proceeding, *id.* at 13a, it held that *Evitts* must be applied "in equal measure to the clemency procedures," *id.* at 14a. The court was wrong.

First, the lower court's attempt to respect *Evitts* necessarily slights *Dumschat.* Either the States have broad authority to enact clemency procedures under the due process clause or they do not. The States' wide discretion in establishing a clemency procedure under *Dumschat* cannot tenably co-exist with a separate set of limitations on the same procedure under *Evitts*. The extension of *Evitts* to the clemency setting invariably contracts the discretion given to the States under *Dumschat,* as the Sixth Circuit's decision in this case well illustrates: Ohio is entitled to judgment as a matter of law under *Dumschat* but must undergo further scrutiny under *Evitts*. Because just one due process clause governs State action, the States should be required to follow just one set of procedural rules in trying to obey the clause.

Second, there is no need to create a fork in the federal review of clemency procedures because *Evitts* and *Dumschat*, follow one rule, not two, and in the end are entirely compatible with each other. Each case, to begin with, arose at a very different stage in the criminal process. *Dumschat* arose long after the defendant had completed direct review of his conviction and sentence, while *Evitts* arose on direct review of a criminal conviction. At issue in *Evitts* was whether due process guarantees a criminal defendant effective assistance of counsel on his first appeal as of right. Building on the criminal defendant's constitutional right to counsel on direct appeal, *see Douglas v. California*, 372 U.S. 353 (1963), *Evitts* concluded that the right to counsel necessarily includes the right to effective counsel. "[I]f a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,'" the Court reasoned, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." 469 U.S. at 393 (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

Yet this conclusion, together with the reasoning underlying it, by no means diverts from the due process framework applied in *Dumschat*. Just because a direct appeal of right constitutes a part of the "system for finally adjudicating the guilt or innocence of a defendant" does not mean that a clemency proceeding does as well. Clemency proceedings and direct appeals of right fall on different sides of a constitutional line that existed long before *Dumschat* and *Evitts*. It is precisely the line that explains why the Fourteenth Amendment grants criminal defendants a right to counsel at trial, *see Gideon v. Wainwright*, 372 U.S. 335 (1963), and a right to counsel on a direct appeal as of right, *see Douglas v. California*, 372 U.S. 353 (1963), but denies such a right for discretionary appeals, *see Ross v. Moffitt*, 417 U.S. 600 (1974), as well as for disciplinary proceedings, *see Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). And it is precisely the line that *Dumschat* recognized in stating that the liberty interests of those whose guilt and innocence has been determined rests on a different footing from those whose guilt and innocence has not been determined. 452 U.S. at 464.

The lower court's *Evitts/Dumschat* dichotomy is false in another respect. It may be true, as the court of appeals reasoned, that the States have no obligation to grant direct appeals of right to criminal defendants. *See Evitts,* 469 U.S. at 393 (citing *McKane v. Durston*, 153 U.S. 684 (1894)); Pet. App. 12a-13a. And it may be true that the States likewise have no obligation to permit clemency applications. *See Dumschat, supra;* Pet. App. 12a-13a. But it does not follow that Ohio's decision to offer both procedures to convicted criminals creates a due process life or liberty interest in each. *See* Pet. App. 13a.

Beyond the States' initial discretion to establish an appeal of right and an opportunity to seek clemency, the two procedures have little in common. One is part and parcel of

the judicial process; the other stands apart from the judicial process. One turns on the courts' view of the defendant's guilt or innocence; the other exists in spite of the courts' view of the defendant's guilt or innocence. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833) ("the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially"). And one procedure comes to defendants as a matter of right; the other comes to them as a matter of grace.

Thus, while the executive retains unfettered discretion to deny clemency applications, the same is not true with respect to direct criminal appeals. In Ohio, as in other States, a defendant who establishes that no evidence supports the conviction is guaranteed a reversal, *State v. Jenks*, 574 N.E.2d 492 (Ohio 1991), as is the defendant who establishes that the trial was improperly conducted, *State v. Sage*, 510 N.E.2d 343, 351 (Ohio 1987). The State has placed no such limits on its exercise of the clemency power, and accordingly has not created a liberty interest warranting procedural protection. The discretionary nature of clemency, in short, is not a legitimate counterpart to a first appeal of right, and the liberty interest created by one simply does not apply to the other.

Third, besides elevating *Evitts* at the expense of *Dumschat* and besides finding tension in the case law when there is symmetry, the lower court's analysis sets in motion a theory that could well jeopardize other settled features of due process law. It takes little vision to anticipate how the adoption of this approach could transform *Evitts* into an eye-straining grant of judicial authority to review all manner of State practices. It is unclear, for example, why the lower court's interpretation does not apply with equal force to State-court discretionary appeals or to State and federal post-conviction proceedings. If the most discretionary State procedure known to the criminal law (clemency) warrants due

process review, surely less discretionary features of the criminal law deserve it as well. But that conclusion not only makes *Dumschat* a dead letter, it also spells the demise of *Ross v. Moffitt*, 417 U.S. 600 (1974) (due process does not require appointment of counsel for discretionary appeal from criminal conviction), of *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (due process does not require appointment of counsel for non-capital inmates seeking State post-conviction relief), and of *Murray v. Giarratano*, 492 U.S. 1 (1989) (due process does not require appointment of counsel for capital inmates seeking State post-conviction relief).

The lower court's analysis, in other words, not only finds tension between *Dumschat* and *Evitts* when there is none; but the court's alleged solution also will beget still more tension in the case law, which will beget still more dilution of the States' traditional discretion in these areas. The Court should not allow this novel approach to take root.

D. Subjecting Clemency Proceedings To Judicial Review Will Impede, Not Advance, Requests For Mercy.

In addition to breaking new ground in subjecting clemency to due process review, the lower court's approach ultimately disserves the basic point of permitting clemency -- to ensure that the executive branch has an opportunity to correct miscarriages of justice and impart mercy. Clemency has long been an executive function, one established to "prevent[] miscarriages of justice where judicial process has been exhausted," *Herrera v. Collins*, 506 U.S. 390, 412 (1993), not to produce another layer of judicial review, *see Ex Parte Grossman*, 267 U.S. 87, 120-121 (1925); *Schick v. Reed*, 419 U.S. 256, 267 (1974). Clemency thus allows the

State to impart mercy not because it is due but quite often in spite of whether it is due.

Under these circumstances, the real value of continuing to honor the judiciary's restraint in this area stems from the two-way nature of clemency review. If criminal defendants may seek judicial review of State clemency procedures and decisions, will not victims and their families have the same right when they disagree with the executive's decision to grant clemency? Nor is this an abstract point, at least in Ohio. In 1991, in his last week of office, then-Governor Richard Celeste commuted the sentences of eight capital inmates and 68 other prisoners. In spite of the firestorm of protest that emerged over these wholesale commutations, neither the victims' families nor anyone else was ever able to undo these acts of mercy. *See State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994). The reason was straightforward: The Ohio Governor's authority to deny or grant these clemency applications was not reviewable. *Id.*; *State v. Morris*, 378 N.E.2d 708 (Ohio 1978); *Knapp v. Thomas*, 39 Ohio St. 377 (1883).

As the Ohio experience reveals, lack of judicial oversight over executive clemency decisions preserves a separation-of-powers principle that is as apt to be a benefit as a hazard to capital inmates. A similar principle operates at the federal level, as the Court has recognized in restricting congressional interference with the President's clemency power, *see Ex Parte Garland*, 71 U.S. 333 (1866) ("[t]he benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions"), and in historically refusing itself to second-guess the President's clemency prerogative, *cf. Ex Parte Grossman*, 267 U.S. 87, 119 (1925); *United States v. Klein*, 80 U.S. 128, 147 (1872).

Nor is there any basis in logic or experience for respecting structural requirements at the federal level but disregarding them when it comes to the vertical separation of powers between the federal government and the States. In view of the "dual sovereignty" of the State and national governments, *Printz v. United States*, ___ U.S. ___, 65 U.S.L.W. 4731, 4737-4738 (1997), the State clemency procedures deserve no less independence from judicial oversight than their federal counterparts.

Breaching these lines of authority also will undermine one of the benefits of centralizing the clemency power. By making clemency as much the responsibility of the federal judiciary as the executive branch, the courts will remove Presidents and Governors from the immediacy of the vital power they exercise.

> "As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection, that the fate of a fellow creature depended on his sole fiat, would naturally inspire scrupulousness and caution."

Schick v. Reed, 419 U.S. 256, 263 (1974) (quoting Federalist No. 74); *see also* Brown, *The Quality of Mercy*, 40 U.C.L.A. L. Rev. 327, 335 (1992); Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 Yale L.J. 389, 391 (1989) ("mercy must stand outside and above justice, contemplating death sentences from a perspective external to the norms of due process").

In the final analysis, notions of redemption, mercy and grace do not lend themselves to procedural review because they exist in spite of, not because of, whether they are due. The lower court's conclusion to the contrary is not only wrong as a matter of law, but in the end threatens to impede rather than advance every inmate's last hope -- the sovereign's forgiveness. The decision should be reversed.

II. A VOLUNTARY INTERVIEW, REQUESTED BY THE INMATE AS PART OF A STATE'S CLEMENCY PROCEDURE, DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S PRIVILEGE AGAINST SELF-INCRIMINATION.

No less flawed is Mr. Woodard's second claim -- that Ohio placed an unconstitutional condition on his Fifth (and Fourteenth) Amendment privilege against self-incrimination by permitting him to seek a voluntary clemency interview without counsel and by doing so without a grant of immunity for the things he might say. Because the right to counsel does not extend to clemency proceedings and because the privilege against self-incrimination does not prohibit voluntary statements, the Sixth Circuit also erred in failing to reject this claim as a matter of law.

A. States Do Not Violate The Fifth Amendment Unless They Compel Speech Or Compel Individuals To Waive The Privilege In Order To Assert Another Constitutional Right.

The doctrine of unconstitutional conditions is less of a doctrine and more of a question whether government has violated a specific guarantee of the United States Constitution. The Constitution nowhere prohibits States from placing conditions on the exercise of constitutional rights, and nowhere prohibits individuals from waiving those rights. Because "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid," *Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978), the Constitution just prohibits the States from directly violating those rights or indirectly doing so by placing improper sanctions on those who exercise them.

As made applicable to the States by the Fourteenth Amendment, the Fifth Amendment commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Am. V. The guarantee of course does not prohibit criminal defendants from speaking freely in incriminating ways, either because the truth ultimately advances their cause or because the truth for all its shortcomings may still be liberating. All the clause prohibits is "compelled" testimony, which runs the risk of being inaccurate and thus disserves the goals of a legitimate and fair penal system. *Miranda v. Arizona*, 384 U.S. 436, 457 (1969).

In several cases, the Court has explained the contours of government procedures that improperly compel

incriminating speech and those that do not. The first of these cases, *Simmons v. United States*, 390 U.S. 377 (1968), arose from a botched attempt to rob a local bank. After the arrest, the defendant tried to suppress evidence of the contents of a suitcase on Fourth Amendment grounds. In order to do so under then-existing law, the defendant had to admit ownership of the suitcase, *see Jones v. United States*, 362 U.S. 257 (1960), *over'd in part, Rakas v. Illinois*, 439 U.S. 128 (1978), *over'd in part, United States v. Salvucci*, 448 U.S. 83, 84 (1980), which understandably created a "dilemma" for the defendant in view of the government's decision to use all suppression testimony against him at trial. 390 U.S. at 391. Noting that a "defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him," *id.* at 393, the Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 394.

As later cases showed, the *Simmons* decision represented the exception, not the rule, in the area of criminal procedure. Three years later, in *Wyman v. Jones*, 400 U.S. 309 (1971), the Court rejected a claim that the government penalizes Fourth Amendment rights when it conditions acceptance of Aid to Families with Dependent Children (AFDC) on the recipient's submission to warrantless searches. Focusing on the individual's initial option to accept AFDC benefits, the Court found no coercive action by the government. The beneficiary was free to choose between foregoing benefits and preserving the privacy of her home, or accepting the benefits and consenting to the searches. *Id.* at 317-18. In contrast to the facts in *Simmons*, the government had not set up one constitutional right against another. It had merely placed a condition on a government benefit, one that it was fully entitled to impose.

Soon after *Wyman*, the Court rejected an attempt to engraft the doctrine of unconstitutional conditions onto a State criminal procedure. In *McGautha v. California*, 402 U.S. 183 (1971), the defendant challenged Ohio's single trial procedure, which then said that a defendant could exercise his right against self-incrimination only on the condition that he also surrender his right to testify on the issue of punishment. In defendant's view, the procedure improperly compelled him to choose between remaining silent on the issue of guilt at the cost of surrendering any chance to plead his cause on the issue of punishment. *Id.* at 211. The Court rejected the challenge.

Writing for the Court, Justice Harlan noted that the rules of criminal procedure, like the rest of the legal system, are replete with situations requiring "the making of difficult judgments" as to which course to follow. *Id.* at 213. Even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the right involved." *Id.* Measured against this modest standard, the Court found no such impairment through a state procedure that forced consistency -- by requiring the defendant to choose between remaining silent on both issues or testifying on both issues. *Id.* at 217.

In *Baxter v. Palmigiano*, 425 U.S. 308 (1975), the Court followed the same course. The defendant challenged a State procedure that forced inmates to choose between (1) waiving their Fifth Amendment privilege to testify at a disciplinary hearing or (2) remaining silent and having an adverse inference drawn from their silence. The Court upheld the procedure, observing that "permitting an adverse inference to be drawn from an inmate's silence at his

disciplinary proceedings is not, on its face, an invalid practice." *Id.* at 320. More recent cases are to the same effect. *See, e.g., Griffin v. Wisconsin*, 483 U.S. 868 (1987) (permitting warrantless searches of the residences of individuals on probation); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (the prosecutor may present "the defendant with the unpleasant alternative of forgoing trial or facing charges on which he was plainly subject to prosecution"); *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973) (prosecutor may encourage guilty plea even though it requires waiver of jury trial right).

As these cases make clear, the States may offer government benefits on the condition that the recipient waive certain criminal procedure rights (*Wyman, Griffin, Hayes, Chaffin*), and they may restrict individuals who demand the right to speak freely in one setting and insist on immunity in another (*McGautha, Baxter*). Only when the government "'benefit' to be gained is that afforded by another provision of the Bill of Rights," as it was in *Simmons*, 390 U.S. at 394, does a Fifth Amendment violation occur.

B. Ohio's Clemency Procedure Does Not Violate The Fifth Amendment.

Sized up against this standard, Ohio's clemency procedure withstands scrutiny. As a preliminary matter, any suggestion that Mr. Woodard is entitled to counsel at the clemency interview is mistaken. The right to counsel by its very terms is limited to "criminal cases," *Hannah v. Larche*, 363 U.S 420, 440 n. 16 (1960), and does not extend beyond the first appeal of right, *see, e.g., Pennsylvania v. Finley*, 481 U.S. 551 (1990); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Wolff v. McDonell*, 418 U.S. 539 (1974); *Ross v. Moffitt*, 417 U.S. 600 (1974). Because Mr. Woodard had no right to counsel

at the clemency interview, he cannot tenably claim that he was forced to sacrifice his right to counsel in order to participate in the clemency procedure.

Nor is this a case like *Simmons* in which the government forced the defendant to sacrifice one constitutional right in order to assert another. Because Ohio was not compelled to provide a clemency interview, it was free to set the terms on which it would be provided so long as it did not force the defendant to sacrifice another constitutional right in doing so. Here, the procedure allows Mr. Woodard to decide whether to make a statement and if so to determine how much or how little he wishes to say. A State does not abridge the right against self-incrimination when the decision to communicate is completely voluntary and the State does not force inmates who choose silence to bargain away another constitutional right. *See Simmons*, 390 U.S. at 389-94; *Murphy v. Minnesota*, 465 U.S. 420, 429 (1984) (an individual confronted with questions "ordinarily must assert the privilege rather than answer if he desires not to incriminate himself").

Mr. Woodard's contrary arguments are mistaken. He mainly appears to complain about the timing of the interview, not its existence. Since the interview in this instance arose while his State post-conviction proceeding was ongoing, he argues that what he says in the interview could be used to defeat his habeas claim or set up some other claim by the State. This is particularly unsettling, in Mr. Woodard's view, because his best chance at clemency could require him to admit his transgressions with the hope that candor would improve his odds of obtaining mercy.

The timing problem is one of his own making. So long as the defendant obtains a stay more than 45 days before the execution date, the procedure and the interview that goes

with it do not commence. Any timing concerns can be remedied by seeking a stay more promptly, particularly since Ohio guarantees capital inmates an initial six-month stay to exhaust state post-conviction remedies. *State v. Glenn*, 514 N.E.2d 869 (Ohio 1987). In this instance, for example, the Court denied Mr. Woodard's petition for certiorari on June 27, 1994. Then, on July 18, 1994, the Ohio Supreme Court set an October 7, 1994 execution date. Nonetheless, Mr Woodard waited until August 16, 1994 to ask the Ohio Supreme Court for a stay to pursue post-conviction relief, which was too late to halt the clemency investigation.

But even late filers like Mr. Woodard are not necessarily prejudiced in the end. They can always exercise their right to silence during the initial clemency investigation. Then, assuming they fail to obtain collateral relief from the State or federal courts, they can file a new clemency application and seek an interview at that point in time. *See* Ohio Death Penalty Clemency Procedure VI (G). The essential point is that the procedure "is not, on its face, an invalid practice, and there is no basis in the record for invalidating it as here applied to" Mr. Woodard. *Baxter*, 425 U.S. at 320.

At any rate, what Mr. Woodard's theory of constitutional law really demands is something he could not possibly want. The risk that the words uttered in a clemency application may be used against a defendant in a post-conviction proceeding exists for *all* clemency procedures, not just Ohio's. That is because clemency applications of capital inmates invariably overlap to some degree with post-conviction proceedings. It is the rare individual who does not pursue both routes, as opposed to just one, in trying to seek relief from an imminent execution date. If Mr. Woodard is correct, however, no State could initiate clemency proceedings until the last post-conviction proceeding had

ended, which would be too late to matter or would be too late to allow for a thorough investigation of the application. In other words, the dilemma faced by the clemency applicant who wishes to make self-incriminating statements in order to improve chances at clemency does not go away with the invalidation of Ohio's interview procedure. It would still exist for all written clemency applications, so long as all routes of post-conviction had not been used, including for example the occasional "actual innocence" claim that may surface immediately before an execution date. *See Herrera v. Collins*, 506 U.S. 390 (1993).

Much of the criminal law involves instances in which the defendant must make a difficult choice between pursuing one line of factual development or another or advancing one legal right over another. The right to testify, to use the most obvious example, cannot simultaneously be exercised with the right to remain silent -- and vice versa. Yet under the Sixth Circuit's reasoning, state and federal officials may no longer rely on this long-accepted truth. Removing the opportunity to present defendants with free (albeit difficult) choices undermines authority to allocute at sentencing for a potentially lighter sentence, to plea bargain for a potentially lighter sentence, to cast light on remaining silent at a prison disciplinary hearing, to force someone to present an alibi defense, or ultimately even to cross-examine individuals that agree to testify at trial.

The privilege against self-incrimination does not apply in these or other circumstances, and most particularly not in the context of Ohio's clemency procedure. The court of appeals' contrary decision should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

WILLIAM A. KLATT
First Assistant Attorney General
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

Date: August 21, 1997

APPENDIX

1. The Fifth and Fourteenth Amendments to the United States Constitution provide, in pertinent part:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

2. Article III, Section 11 of the Ohio Constitution provides:

The Governor shall have power, after conviction, to grant reprieves, commutations, and pardons for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper; subject, however, to such regulations, as to the manner of applying

for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the Governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The Governor shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the Governor's reasons therefor.

3. Section 2967.07 of the Ohio Revised Code provides:

All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes relating to the case.

4. The Ohio Death Penalty Clemency Procedure provides:

I. *AUTHORITY*

This policy is issued in compliance with Ohio Revised Code 5120.01 which delegates to the Director of the Department of Rehabilitation and Correction authority to manage all Divisions and Institutions of the Department and to establish such rules and regulations as he prescribes.

II. *PURPOSE*

The purpose of this policy is to establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed.

III. *APPLICABILITY*

This policy applies to the Ohio Parole Board and other employees of the Ohio Department of Rehabilitation and Correction, who are responsible for collecting and providing information, scheduling hearings, providing notices, etc., and to prisoners under sentence of death and the attorneys representing them.

IV. *DEFINITIONS*

None.

V. *POLICY*

It is the policy of the Ohio Department of Rehabilitation and Correction to fulfill its duties

related to the executive clemency process in a manner that is expeditious and is fair to the condemned prisoner, as well as to the family and friends of the victim and the public at large.

VI. *PROCEDURE*

A. Notification to all condemned inmates of this policy.

1. All prisoners committed to the Department of Rehabilitation and Correction with a sentence of death shall be given a copy of this policy.

B. Information gathering and scheduling of the hearing:

1. At the time the Ohio Supreme Court completes its review of a criminal case upon direct appeal, and fixes an execution date, the institution or office of the department receiving notice of such decision shall forward a copy to the Parole Board.

2. Upon receipt of said notice or upon its own initiative, the Parole Board shall request an investigation into the details of the prisoner's offense, prior record and other relevant information.

3. Forty-five days in advance of any scheduled execution date, unless that date has been stayed, the parole board chair will schedule a clemency review to be held at central office. This clemency review will be scheduled to occur approximately twenty-one days prior to the scheduled execution date.

The parole board shall send any required notices to the sentencing court, the prosecutor, and the victim's family or representative.

4. The parole board shall also have a notice delivered to the prisoner advising him that he may request to be interviewed in person by one or more parole board members or hearing officers and have the board consider any statements he may make. The parole board will send a copy of this notice to the office of the public defender or other counsel for the prisoner.

5. Once the clemency review hearing has been scheduled, it shall be completed and a recommendation made to the Governor regardless of any subsequent stay of the execution of the sentence.

C. Interview of prisoner by parole board member or hearing officer.

1. The parole board chair will cause the notice advising that the board will be considering his case for a clemency recommendation to be personally delivered to the prisoner. This notice shall advise him that if he requests it in writing, he will be interviewed by one or more parole board members or hearing officers prior to the board considering his case. The notice shall advise him that he can make the request by noting his desire for the interview on the notice and returning it to the parole board chair. The prisoner will be asked to submit to a

psychological or psychiatric evaluation as determined appropriate by the Parole Board.

2. If the prisoner requests the personal interview, the parole board chair will appoint one or more board members or hearing officers to interview the prisoner at the confining institution. Only the prisoner and the person or persons assigned by this parole board chair shall be present at the interview.

D. Attendance at the hearing:

1. The hearing will be held at central office during normal business hours.

2. If the prisoner chose to be interviewed, each of the board members and hearing officers that attended the interview shall attend the hearing to present to the board any information offered by the prisoner.

3. Attendance by others at the hearing is at the sole discretion of the parole board chair.

E. The nature of the hearing:

1. At the hearing, the Parole Board will consider all available relevant information including any application for clemency that the prisoner submitted and any statement that he gave to the board members or hearing officers that interviewed him.

2. The Parole Board shall deliberate and render a decision the day of the hearing if possible.

Once the decision is made, minutes will be signed by the Parole Board and the decision communicated to the Chief Legal Counsel for the Governor.

3. Within five (5) business days after the Parole Board's decision, the Governor's Office will receive the written report and recommendation. The Parole Board will notify the prisoner, the prisoner's counsel, the prosecutor, the victim's representative and the Office of the Attorney General of its recommendation.

4. A press release shall be prepared by the Public Information Office and made available to the media after the report and recommendation have been delivered to the Office of the Governor.

F. In the event that there is insufficient time before a scheduled execution to utilize the normal information gathering or hearing process, the normal procedure shall not apply. The Parole Board shall assemble as much information as is feasible under the circumstances. Within the discretion of the chairman of the Parole Board, a hearing may be scheduled, provided, however, that there is sufficient time to arrange for the appropriate Parole Board officials to be present and that the necessary parties either receive the legally-required notice or waive such notice. In the event that a hearing is convened, the provisions of this policy governing such hearings shall apply. In the event that no hearing is held, the chairman of the Parole Board may forward an informational report to the office of Chief Legal Counsel for the Governor.

G. In the event that the Parole Board is made aware of information or circumstances not considered in its initial determination, or upon the filing of a subsequent petition on behalf of the condemned prisoner, the Parole Board may supplement its initial decision and recommendation with such informational update as may be appropriate. At the discretion of the chairman of the Parole Board, a hearing may be convened for this purpose. If such a hearing is convened, it shall be conducted according to the procedures specified in this policy for the initial consideration. Following any updated investigation or hearing, the Parole Board may elect to notify the office of Chief Legal Counsel for the Governor of an informational update to its original decision, or make a new decision and recommendation.

H. At the time of the notice of a hearing to consider clemency under this policy, or any time subsequent, the family of the victim or a representative may be given the opportunity to waive notice of any subsequent hearings or decisions.

STATE CLEMENCY PROCEDURES.

A. States that vest clemency power in Governor.

Alaska Const. Art III §21, Alaska Stat. Ann. §33.20.070. - .080 (1996); Ariz. Const., V § V, Ariz. Rev. Stat. Ann. §31-441-446 (1996); Ark Const. Art. VI §18, Ark. Code. Ann. §16-93-204 (1995); Cal. Const. Art. V §8, Cal. Govt. Code § 4800 (1992); Col. Const. Art. IV § VII, Col. Rev. Stat. Ann. § 16-17-101 (1996); Del. Const. Art. VII §1, Del. Code Ann. tit. 11 § 4361 - 63 (1996); Fla. Const. Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996); Haw. Const. Art. IV § V, Haw.

Rev. Stat. § 353-72, § 706-656 (1996); Ill. Const. Art. V § 12, Ill. Code § 5/3-3-13 (1996) ; Ind. Const. Art. V § 17, Ind. Code § 11-9-2-1 to 11-9-2-3 (1996); Iowa Const. Art. IV § 16, Iowa Code § XVI-3-914.1 (1996); Kan. Const. Art. I § 7, Kan. Stat. Ann. 37 § 22-3701 (1996); Ky. Const. § 77; La. Const. Art. IV § 5, La. Rev. Stat. Ann. 15 § 572 (1997); Me. Const. Art. V Pt. 1, Me. Rev. Stat. 307-15 § 2162 (1996); Md. Const. Art. II § 20, Md. Ann. Code Art. 41 § 513 (1996); Mass. Const. Art. VIII § 64, Mass. Gen. Laws Ann. 127 § 152 -157 (1997); Mich. Const. Art. V § 14, Mich. Stat. Ann. § 28.2313, 28.314 (1996) ; Miss. Const. Art. V § 124, Miss. Code Ann. § 47-5-115 (1997); Mo. Const. Art. IV, Mo. Rev. Stat. XIII § 217.800 (1996); Mont. Const. Art. VI § 12, Mont. Code Ann. 46-23-301 to 46-23-316 (1995); N.H. Const. Pt. 2 Art. 52, N.H. Rev. Stat. Ann. 4:21 to 25 (1996); N.J. Const. Art. III § 2, N.J. Stat. § 2A:167-4 (1996); N.M. Const. Art. V § 6, N.M. Stat. Ann. 31-21-17 (1997); N.Y. Const. Art. IV § 4, N.Y. C.L.S. Exec. § 15 (1997); N.C. Const. Art. III § 5, N.C. Gen. Stat. § 147-23 (1996); N.D. Const. Art. 5 § 6, N.D. Cent. Code § 12-55-05 (1995); Ohio. Const. Art. III § 11, Ohio. Rev. Code Ann. 2967.02 (1997) ; Ok. Const. Art. VI § 10, 57 Ok. Stat. tit. 57 § 332 (1996); Or. Const. Art. 5 § 14, Or. Rev. Stat. 144.640 (1996); Pa. Const. Art. IV § 9, Pa. Stat. Ann. 71 § 299 (1996); R.I. Const., Art. II, Section XIII, R.I. Gen. Laws §13-10-1 (1996); Tenn. Const. Art. III § 6, Tenn. Code Ann. § 40-27-101, 40-28-104 (1996); Tex. Const. Art. IV § 11, Tex. Code Crim. Proc. Ann. Art. 48.01 (1997); Vt Const. Ch 2, § 20, Vt. Stat. Ann. §809-810 (1996); Va. Const. Art. V § 12, Va. Code. Ann. § 53.1-229 (1996); Wash. Const. Art. III § 9, Wash. Rev. Code Ann. 9.94A.394; W.Va. Const. Art. VII § 11, W.Va. Code Ann. § 5-1-16 (1996); Wis. Const. Art. V § 6, Wis. Stat. § 973.013 (1995-96); Wyo. Const. Art. 4 § 5, Wyo. Stat. Ann. § 7-13-401 (1996).

B. States that vest clemency power in a board.

Conn. Const. Art. IV. § 13, Conn. Gen. Stat. § 321-18-24a, 321-18-30 (1997); Ga. Const. Art. IV § 2, Ga. Code Ann. § 42-9-20, 42-9-45 (1997); Idaho Const. Art. IV § VII, Idaho Code § 20-240 (1997); Minn Const. Art. V, § 14, Minn Stat. §638.01 (1996); Neb. Const. Art. 4 § 13, Neb. Rev. Stat. § 83-1 (1996); Nev. Const. Art. 4 § 14, Nev. Rev. Stat. § 213.005 to 213.100 (1995); S.C. Const. Art. IV § 3, S.C. Code Ann. § 24-21-910 to 24-21-1000 (1996); S.D. Const. Art. IV § 3, S.D. Codified Laws § 24-14-1 (1997); Utah Const. Art. VII, §12, Utah Code Ann. § 77-27-5 (1996).

C. States that vest clemency power in Governor and a board.

Ala. Const. Art. V, Ala Code § 15-22-27, 15-22-36, 15-22-37 (1996).

D. States in which Governor sits on clemency board.

Fla. Const. Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996); Idaho Code § 20-240 (1997); Neb. Const. Art. 4 § 13, Neb. Rev. Stat. § 83-1(1996); Nev. Const. Art. 4 § 14, Nev. Rev. Stat. § 213.005 to 213.100 (1997).

E. States in which Governor may grant clemency only upon the positive recommendation of board.

Ariz. Const., V § V, Ariz. Stat. Ann. §31-441-446 (1996); Del. Const. Art. VII §1, Del. Code Ann. Tit. 11 § 4361 - 63 (1996); Fla. Const. Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996); Ind. Const. Art. V § 17, Ind. Code § 11-9-2-1 to 11-9-2-3 (1996); La. Const. Art. IV § 5, La. Rev. Stat. 15 § 572 (1997); Ok. Const. Art. VI § 10, 57 Ok. Stat. § 332 (1996); Pa. Const. Art. IV § 9, Pa. Stat. 71 § 299 (1996) ;Tex. Const. Art. IV § 11, Tex. Code Crim. Proc. Ann. Art. 48.01 (1997).

F. States specifically providing for inmate interview by statute, code or rule.

Ariz. Comp. Admin. R. & Regs. R5-4-602(C)(4) (1996); Florida Rules of Executive Clemency (1997); Iowa Code §914.5(2); Mich. Const. Art. V § 14, Mich. Stat. Ann. § 28.2313, 28.314 (1996); Ohio Death Penalty Clemency Procedure, Sect. VI(C)(2) (1994); Penn Stat. 71 § 299, 37 PA. Code § 81.282 (1996) (capital inmates only); S.D. Admin. Rules 17:60:05:01 (1997); Tenn. Bd. Of Paroles Rule 1100-1-1-.15; Utah Code Ann §77-27-7 (1996).

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In The

Supreme Court of the United States

October Term, 1997

OHIO ADULT PAROLE AUTHORITY, et al.,

Petitioners,

v.

EUGENE WOODARD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT

DAVID H. BODIKER
Ohio Public Defender
Counsel of Record

GREGORY W. MEYERS
Senior Assistant Public Defender
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

S. ADELE SHANK
P.O. Box 8053
Columbus, Ohio 43201
(614) 326-1217

MICHAEL J. BENZA
1698 Oakmount Road
South Euclid, Ohio 44121-4045
(216) 297-0929

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I

Whether due process protections apply at all to Ohio's unique, mandatory capital clemency procedure that governs the parole board's investigation and recommendation process, which must be completed before the Governor may grant or deny clemency.

II

Could any set of facts consistent with Woodard's complaint establish that Ohio's Death Penalty Clemency Procedure imposes an unconstitutional condition on his Fifth and Fourteenth Amendment right against self-incrimination.

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STATEMENT OF THE CASE

1. Facts

Counsel for twenty-three year old death row inmate Eugene Woodard was informed on September 6, 1994 that three days later, Mr. Woodard could make a plea for his life in a clemency interview. Mr. Woodard had not applied for clemency. At the interview, Mr. Woodard would not be permitted to have counsel with him. The interview might, at Petitioners' discretion, be Mr. Woodard's only chance to ask for clemency for two years. His statement could be used against him if he won a re-trial or new sentencing. Counsel was also informed that a clemency hearing for Mr. Woodard would be held on September 16, 1997 but that neither he nor Mr. Woodard could be present. [J.A. p. 4]

The following day Mr. Woodard's counsel sent a letter to the Ohio Adult Parole Authority (APA), informing it that Mr. Woodard had been granted a stay of execution in order to pursue state post-conviction remedies, objecting to the proceedings on a number of grounds, and asking that both the interview and hearing be continued. [J.A. pp. 4-5] Counsel received no response. As a result this action was filed. [J.A. p. 5]

2. Ohio Clemency Law

Mr. Woodard's execution date was set at the conclusion of his state appellate proceedings. Two days later, on July 21, 1994, Ohio's new Death Penalty Clemency Procedure went into effect. [J.A. pp. 8-14] The Death Penalty

Clemency Procedure was adopted by the Ohio Department of Rehabilitation and Correction, pursuant to a legislative delegation of authority under Ohio Rev. Code Ann. § 5120.01.[1] The new procedure regulates the processes to be followed by the Ohio Adult Parole Authority ("APA") when conducting clemency hearings for death row inmates.[2]

In Ohio, clemency review is a two stage process: the application stage and the executive decision making stage. Ohio's two part clemency process was recently explained by the Ohio Supreme Court in *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 524-525, 644 N.E.2d 369, 378 (1994):

> The exercise of the pardoning power involves two distinct elements – the application process and the consideration process. The phrase [in Ohio Const. art. III, § 11] 'manner of applying for pardons' includes the entire application process, which encompasses the filing of the application itself, the investigation, the recommendation, and the full report compiled by the APA.

[1] The Department of Rehabilitation and Correction is a department of the executive branch. The director's position is a cabinet level appointment. Ohio Const. art. III, § 21; Ohio Rev. Code Ann. §§ 121.02(O), 121.03(Q).

[2] While not a matter for this Court's determination, there is a question as to whether this policy was legally enacted. In the only challenge to the policy litigated in the Ohio Courts, the Tenth District Court of Appeals affirmed the dismissal of a declaratory judgment action on procedural grounds. The court went on to say, however, that had the question been properly presented, it would have found the policy unconstitutional, as applied, under the pre-1996 amendment to Article III, section 11 of the Ohio Constitution. *Coleman v. Ohio Adult Parole Authority*, 1996 WL 566010 (Ohio App. 10th Dist. 1996).

> We find that the General Assembly's authority to regulate the application process extends to the time just before the Governor reaches a substantive decision concerning pardon. Once this point is reached, the General Assembly's constitutionally granted authority to regulate procedurally the pardoning power of the Governor is at an end.

Once the written application is filed, the APA conducts an investigation, makes a recommendation, and reports both to the Governor. The investigation includes an interview with the inmate (if the inmate requests one), a hearing with input from the prosecuting attorney, the trial judge, and the victim's representative, and a review of the inmate's prison file. Ohio Rev. Code Ann. § 2967.07.[3] After the report and clemency recommendation are forwarded to the Governor, the APA has no further role in the process. The Governor of Ohio then decides whether to grant or deny clemency.

The Death Penalty Clemency Procedure establishes a mandatory clemency review that commences when the Ohio Supreme Court completes direct appellate review of a capital case. The investigation begins immediately.

[3] The portions of this statute relating to commutations and reprieves were held unconstitutional under Ohio Const. art. III, § 11. *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 644 N.E.2d 369. Section 11 was amended, effective January 1, 1996, to allow legislative regulation of the manner of applying for commutations. Ohio Rev. Code Ann. § 2967.07 has not been reenacted since the constitutional amendment became effective. The references to commutations and reprieves held unconstitutional in *Maurer* still appear in the text of the statute.

Once the court sets an execution date, a clemency "hearing" is held unless a stay is granted 45 or more days before the execution date. This is true regardless of the inmate's wishes. Once a hearing has been scheduled under the Death Penalty Clemency Procedure it cannot be stopped.

When the hearing is scheduled, the prisoner is notified of the hearing and his opportunity to be interviewed by APA parole board members. He is also asked to submit to psychiatric or psychological evaluation.

At the hearing the inmate will not be present. The parole board members who interviewed him will present the information he provided in the interview. Attendance at the hearing, by counsel or anyone other than parole board members, is at the discretion of the parole board chair. A decision on whether to recommend clemency will be made the day of the hearing if possible and the governor informed of that decision. A written report including the results of the investigation and the recommendation will be provided to the governor within 5 days. At that time the inmate, his lawyer, the attorney general, the prosecutor, and the victim's representative will be informed of the recommendation. A press release will be issued informing the media of the APA's recommendation. If there is not enough time to follow this procedure it will be suspended. Thereafter, if new information becomes available, it is within the APA's discretion to supplement its initial decision, hold a new hearing, and inform the governor. Death Penalty Clemency Procedure § VI(A-G), J.A. pp. 9-14.

The Death Penalty Clemency Procedure works in conjunction with Ohio Administrative Code § 5120:1-1-15 and Ohio Rev. Code Ann. §§ 2967.03, .07, and .12.[4] Ohio Rev. Code Ann. § 2967.03 provides that clemency can be recommended only on a finding that "there is reasonable ground to believe that granting [clemency] would further the interests of justice and be consistent with the welfare and security of society." The statute also provides that the APA may not recommend clemency unless it has complied with statutory notice requirements and considered any statements offered by the victim's family or representative. Section 2967.07 of the Ohio Revised Code requires, when a clemency application is filed, that the APA conduct "a thorough investigation into the propriety of granting [clemency]." The APA shall report its findings to the governor in writing. The report shall include a statement of "the facts in the case," the APA recommendation "for or against" granting clemency, "the grounds therefore" and the "records or minutes relating to the case." Ohio Rev. Code Ann. § 2967.12 requires that prior to recommending a pardon or commutation the prosecuting attorney, trial judge, and victim's family be notified. If a representative for the victim provides a written statement

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[4] Ohio Admin. Code § 5120:1-1-15(G) says that the APA clemency recommendation is "within its sole discretion and shall not be subject to administrative review." The Ohio Supreme Court has held that administrative rules cannot supersede statutory requirements. *Williams v. Morris*, 62 Ohio St. 3d 463, 468, 584 N.E.2d 671, 675 (1992). The APA discretion insulated from administrative review by Ohio Admin. Code § 5120:1-1-15 must therefore be exercised under the standards of Ohio Rev. Code Ann. §§ 2967.03, .07, and .12.

to the APA before the clemency recommendation has been made, the victim's statement must be considered.

Ohio Administrative Code § 5120:1-1-15(H) states that if clemency has been denied within two years prior to the APA receiving an application, "the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial. In such case, no hearing and no further investigation shall be necessary unless specifically requested by the governor."

SUMMARY OF ARGUMENT

The due process issue before this Court is a narrow one: whether any due process protections apply to Ohio's unique, legislatively created death penalty clemency application procedures. Executive branch clemency decision making authority and discretion are not at issue.

Life and liberty interests recognized by both federal and state law require that due process protections should be applicable to Ohio's clemency application procedure in some manner. Mr. Woodard has an independent federally protected life interest that remains intact and requires due process protection until execution takes place. While the sentence of death may have diminished Mr. Woodard's right not to be executed by the state for the crime he was convicted of committing, it did not eliminate it. Mr. Woodard, like every capital litigant, has sufficient life interest to invoke the jurisdiction of the courts. He is not legally dead.

The Sixth Circuit found that due process safeguards might be required in Ohio's clemency application process due to the "role of clemency in the entire punitive scheme." *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1186 (6th Cir. 1997). Because of the interaction between the possibility of clemency being granted and all of the judicial proceedings that go before it, clemency is an " 'integral' and inextricable part of the proceedings for determining whether a defendant should be deprived of his life, liberty, or property." *Id., quoting United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996). Clemency is part of the system that protects Mr. Woodard's original, pre-trial life and liberty interests in not being executed by the state.

Mr. Woodard also has life and liberty interests in the state-created right to seek clemency review. Ohio has recognized the opportunity to seek clemency as a right. This state-created right is entitled to due process protection.

The life and liberty interests at issue in Ohio's capital clemency process require some modicum of due process protection. Ohio has chosen to follow a two stage process for resolving clemency decisions in capital cases. The clemency investigation and recommendation that is central to that process implicates the core interests identified in this Court's due process jurisprudence and are no part of the discretionary executive clemency decision. This Court's due process jurisprudence requires that the Sixth Circuit's decision be affirmed.

Finally, because it would violate Mr. Woodard's Fifth Amendment rights to subject him to an uncounseled

interview as a condition of participating in the clemency process, this Court should order the court below, on remand, to consider the effect of Ohio's Death Penalty Clemency Procedure on Mr. Woodard's Fifth Amendment rights.

ARGUMENT

I. AT LEAST MINIMAL DUE PROCESS PROTECTIONS APPLY TO OHIO'S UNIQUE DEATH PENALTY CLEMENCY PROCEDURE

A. This Case Presents a Narrow Question Arising From an Unusual Factual Situation. The Court Should Decline the State's Invitation to Make an Unnecessarily Broad Ruling

The question before this Court is whether Ohio's legislatively created clemency procedures must meet at least minimal due process standards. This case does not arise, as Petitioners claim, "from a challenge to the Ohio Governor's clemency power." [Pet. Br. p. 2] Executive branch decision making authority and discretion are not at issue in this matter. Nor does this case raise the question of whether due process is applicable to every state's clemency process but rather focuses on Ohio's unique clemency procedure. Neither does it ask this Court to determine what process is due.

Recognizing that due process protections may apply in some manner to some clemency proceedings will not create the deluge of litigation predicted by Petitioners. This is so because many states already provide procedural

protections in their clemency processes[5] and because the question presented here revolves on Ohio's unique clemency structure. Petitioners raise the specter that a recognition that due process protections may apply to Ohio's clemency application process in some manner will result in an "eyestraining grant of judicial authority to review all manner of State practices." [Pet. Br. p. 21] There may, of course, be a trickle of cases in other states testing the parameters of such a recognition but it will not be the flood Petitioners predict. No other states have mandatory clemency application practices that overtly deny death sentenced inmates the rudimentary protections that Eugene Woodard has alleged he is denied.[6]

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[5] The majority of the thirty-eight states with the death penalty have some regularized clemency processes which must be followed when clemency is sought. Six states have given the decision making power exclusively to a board. [Table 1, App. p. A-10] Eighteen states use a combination of a board and executive decision maker. [Table 2, App. p. A-10] In nine of those eighteen states, the governor must have a recommendation in order to grant clemency [Table 3, App. p. A-12]; the other nine states require the governor to receive a non-binding recommendation from the board. [Table 4, App. p. A-12] Fourteen states give the governor the sole responsibility for considering clemency applications, although the governor may direct a board to investigate the application. [Table 5, App. p. A-13] In three states the governor sits on the clemency board. [Table 6, App. p. A-14]

[6] The large majority of death penalty states provide procedural protections – such as notice and an opportunity to be heard – that have been long recognized to be the hallmarks of due process. Thirty-five of the thirty-eight states allow a hearing of some sort to review the inmate's evidence. [Table 7, App. p. A-15] Sixteen death penalty states provide for public hearings to review clemency requests. [Table 8, App. p. A-17] Witnesses for both sides may present written or oral statements in thirty-four of the thirty-eight death penalty states. [Table 9, App. p. A-18] In thirty-two states, if

Petitioners' concern that there will be a rush to set due process limits in discretionary appeals and other post-conviction proceedings is misplaced. The law is well settled with regard to such proceedings. *Ross v. Moffitt*, 417 U.S. 600 (1974) (discretionary appeals); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (state post-conviction proceedings). The impetus to test further will come, as it does now, from the circumstances of individual cases – not from the ruling in this matter.

In any case, this Court has found the existence of due process rights over objections based on the "slippery slope." *See, for example, Goss v. Lopez*, 419 U.S. 565, 574 (1975). The amount of litigation potentially engendered by any ruling of this Court has never been determinative of the extent of constitutional protections.

By contrast, holding that due process can never apply to any aspect of clemency proceedings will result in an arbitrary and unreliable clemency system. If no due process protections apply, the door is open to abuses ranging from withholding clemency recommendations in order to wait for the next Governor who might be more inclined to accept the APA's recommendation,[7] to APA decisions to

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the inmate is represented by counsel, that counsel is permitted to be involved in the clemency process. [Table 10, App. p. A-20] Three states specifically provide for the appointment of counsel for a clemency review. [Table 11, App. p. A-22] In only one state, Arizona, is there any arguably mandatory clemency review. There the Board of Pardons has a duty to review every capital case to determine whether a reprieve is warranted. Ariz. Ad. Code R. 5-4-603

[7] This scenario is not far fetched. A similar fact pattern involving judicial appointments underlies the decision in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803).

"slow track" or deny applications from women or minority applicants. It would leave bureaucratic error or misconduct a barrier to a clemency applicant's efforts to reach the Governor should APA employees fail to process the application.[8]

This Court should reject Petitioners' invitation to rule broadly on the right to due process in executive clemency proceedings. The limited scope of the due process issue that is before this Court is apparent from the Sixth Circuit's opinion. The Sixth Circuit "decline(d) to address [Mr. Woodard's] specific due process arguments," deciding only that the District Court had erred in holding that "the Fourteenth Amendment was completely inapplicable to the State's clemency proceedings" on the limited record arising from a motion to dismiss. *Woodard*, 107 F.3d at 1188. Instead, because the Sixth Circuit found that

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[8] *Compare Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, an employee fired due to a physical handicap filed a timely charge with the Illinois Fair Employment Practices Commission, which in turn failed to schedule a timely hearing under the state law. The state court barred the claim even though it was the state commission that erred. This Court reversed, finding that the state's statute created a protected property interest in the handicap-discrimination claim and that dismissing the claim violated federal due process: "[A]ny other conclusion would allow the State to destroy at will virtually any state-created property interest." *Id.*, 455 U.S. at 432. The Court reached this conclusion notwithstanding the fact the state's negligence gave Logan a cause of action against the state in its Court of Claims. "Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole. . . ." *Id.*, 455 U.S. at 436-437. There is little opportunity for redress of an unprocessed clemency application.

it could "imagine extreme situations in which federal due process would be offended," *id.*, and because the facts before the court were insufficient to determine whether such an extreme situation exists in this case, the court remanded.

As this Court has noted in other circumstances, when a state "statute has unique structure and language . . . whether any other state statute provides a protectable entitlement *must* be decided on a case-by-case basis." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), *quoting Greenholtz v. Nebraska*, 442 U.S. 1, 12 (1979) (emphasis added).[9] No other state clemency system precludes or limits review for two or more years after subjecting a death row prisoner to a mandatory clemency process.

This case focuses on a novel, mandatory clemency process within Ohio's unique legislative, administrative, and constitutional structure. The clemency process at issue applies to capital cases only, proceeds regardless of the inmate's wishes, and is used in no other state. Under these circumstances, the Sixth Circuit would have had the district court make a "case-by-case" determination as to whether facts are present that require at least minimal due process protection.

In order to invoke the protection of the Due Protection Clause, one must show state action that infringes

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[9] *See also Ford v. Wainwright*, 477 U.S. 399, 425 (1986) ("Due process is a flexible concept, requiring only 'such procedural protections as the particular situation demands.' ") (O'Connor, J., concurring).

upon a constitutionally protected right to life, liberty, or property. Respondent demonstrates in the following pages the substantial interests at risk in a denial of clemency review. First there is a federally based life interest separate from the life interest at risk in trial. Second, federal life and liberty interests are protected from start to finish of the criminal justice system. Third, Ohio has created a liberty interest in the right to seek clemency. Fourth, there is a state-based life interest at risk when the right to seek clemency is denied or infringed. Each of these interests compels affirmance of the Sixth Circuit's holding and a remand for fact finding.

B. Life and Liberty Interests Arising Under the Federal Constitution are Implicated by Ohio's Death Penalty Clemency Procedure.

1. Mr. Woodard has a Life Interest Protected by the Fourteenth Amendment.

Eugene Woodard has a life interest independent from and broader in scope than the life interest diminished by his death sentence. That independent life interest is protected by the Fourteenth Amendment to the United States Constitution. Mr. Woodard's independent life interest remains intact and requires due process protection until execution takes place. While the sentence of death may have diminished Mr. Woodard's right not to be executed by the state for the crime he was convicted of committing, it did not eliminate his life interest.

Mr. Woodard, like every capital litigant, has sufficient life interest to invoke the jurisdiction of the courts. He is not legally dead. Were he killed by an inmate or

even a state employee such as a prison guard, his own killer would be prosecuted for the wrongful taking of a life despite the fact that it was the state's ward or the state's employee who killed him. Were his execution carried out without complying with the many post-trial state procedures designed to insure its reliability, his executioner would be guilty of homicide. *See Knapp v. Thomas*, 39 Ohio St. 377, 382 (1883) (Sheriff who executes on basis of conviction when presented with a warrant of pardon he believes to be invalid would be guilty of homicide). Mr. Woodard's life interest is protected by the Eighth Amendment guarantee against cruel and unusual punishment until the moment of his death. A death sentence is not the equivalent of an execution. As long as Eugene Woodard's heart pumps and his lungs breathe he has a protectable life interest.

This Court has recognized that the word "life" in the due process clause has meaning separate and apart from the word "liberty." In *Spaziano v. Florida*, 468 U.S. 447, 468 (1984), three Justices of this Court (concurring and dissenting in part) found that "[b]ecause a deprivation of liberty is qualitatively different from a deprivation of property, heightened procedural safeguards are a hallmark of Anglo-American criminal jurisprudence. But that jurisprudence has also unequivocally established that a State's deprivation of a person's life is also qualitatively different from any lesser intrusion on liberty."[10] This

[10] Justice Stevens also wrote that "In the 12 years since *Furman v. Georgia*, 408 U.S. 238 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano*, 468 U.S. at 468.

Court's consistent view that "death is different" has shaped both its due process and its Eighth Amendment jurisprudence in capital cases, and has resulted in a host of procedural protections designed to ensure heightened reliability in the imposition of the punishment. *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Gardner v. Florida*, 430 U.S. 349 (1977); *Beck v. Alabama*, 477 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Ford v. Wainwright, 477 U.S. 399 (1986) demonstrates that the life interest continues beyond conviction and sentencing. *Ford* asked whether Florida could lawfully execute a person who became insane after trial. The Court held that such an execution could not occur. Due process protections were central to the result. Because the Eighth Amendment applies to the states by way of the due process clause of the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring), the execution of an insane inmate would work a deprivation of life without due process of law. Additionally, *Ford* held that Florida's procedures for determining a prisoner's sanity violated procedural due process by not allowing an opportunity to be heard. *Ford*, 477 U.S. at 413-416 (plurality opinion); 424 (Powell, J., concurring); 427-429 (O'Connor, J., concurring in part, dissenting in part). Thus, the purely executive function of carrying out a death sentence after a lawful conviction is

constrained by procedural due process. *Ford* could not have found such constraints in the Fourteenth Amendment if the inmate did not retain a life interest after conviction and sentencing.

Petitioners' reliance on *Dumschat*, 432 U.S. 458, is entirely misplaced. All that *Dumschat* is about – and the only constitutional issue it addressed – is the definition of the "liberty" that is protected by the Fourteenth Amendment. But the text of the Fourteenth Amendment says in plain language that a person's "life" is subject to due process protections whether or not he also has a liberty interest against the state action that kills him. "Life," unlike "liberty" (once liberty is taken to mean more than freedom from confinement), is not a legal construct but a biological fact. Other obvious distinctions aside,[11] the *Dumschat* case is simply inapplicable to a situation in which life is at stake.

The Sixth Circuit noted that in order to demonstrate a protected life interest beyond the life interest protected by "his trial, appeal, habeas petitions, and even his clemency application," Mr. Woodard would have to demonstrate "a separate, life-affecting change in his situation." *Woodard*, 107 F.3d at 1184. In addition to failing to protect Mr. Woodard's "original" life interest [discussed in

[11] *Dumschat* is inapplicable to this matter for many other reasons discussed throughout this brief including the fact that this Court found that Dumshat had not been denied his right to seek clemency. *Dumschat*, 452 U.S. at 467. *Dumschat* focused on the conclusion of clemency review and sought an explanation for the decision while this case focuses on the application procedure that allows clemency review to take place.

section I(B)(2) below], denial of the right to seek clemency is a life-affecting change in Mr. Woodard's situation.

Clemency review is a step in the criminal justice process that protects the reliability of sentences to be sure, but it also protects the broader life interest with which every person is born. It does so in a distinct way that no other step of the criminal justice system process can. Clemency review allows a decision that judges the person/life as a whole. Only in clemency review can rehabilitation be fully considered.[12] Only in clemency review can subsequent acts of courage or self-sacrifice be weighed against the crime for which the applicant was convicted.[13] Only in clemency review, can mercy be shown for those whose mental disabilities, although insufficient to avert legal culpability,[14] so disadvantage them that execution for the crimes that their impaired judgment led them to commit is unfair.[15] Only in

[12] Governor John Brough, 1864, Executive Documents, Part 1, p. 58, *Governor's Message* "The pardoning power has a two-fold object: the one to afford a remedy for any injustice that, from the nature of the testimony, or other circumstances, may have been committed in the conviction; the other to encourage repentance and reformation." *And see generally*, MICHAEL V. DISALLE, THE POWER OF LIFE OR DEATH (1965)

[13] *See* Governor John Bricker, Vol. 121, Ohio Senate Journal Index, p. 1233 (1945), Commutation of Hance Hamilton for "special services rendered to the State at the time of an attempted prison break."

[14] Ohio recognizes only the most stringent definition of insanity. Ohio Rev. Code Ann. §§ 2901.01(A)(14), 2945.391. Unlike some other states, Ohio continues to allow the execution of the mentally retarded.

[15] *See* DISALLE, *supra* note 12, at 64: "Surely society did not need to take the life of a mentally defective individual . . . who

clemency review is the qualitative and quantitative difference between death and every other penalty weighed against the death row inmate's entire life interest. Infringing the right to seek clemency is "a separate life-affecting" change in Mr. Woodard's pre-execution circumstances.

Mr. Woodard's life interest was not extinguished when the death sentence was pronounced. It continues as long as he lives and is protected by the state throughout that time. While a death sentence diminishes the condemned person's life interest in that the state may, in payment for his crime, lawfully take his life on the date and time assigned and in the manner prescribed by law, the condemned person has a life interest in every intervening process that leads to his execution or terminates the state's right to carry it out.

2. Mr. Woodard Has a Protectable Interest In Seeking Clemency that Arises from Clemency's Integral Role in Ohio's Criminal Justice System.

a. Mr. Woodard's Original Pre-trial Life and Liberty Interests are Protected at all Stages of the Criminal Justice Process Including Clemency

The Sixth Circuit correctly found that clemency review is an integral part of Ohio's criminal justice system and that, as such, Mr. Woodard's original pre-trial

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should not have been allowed outside an institution." Reported at Governor Michael V. DiSalle, Communtation of Lewis Bishop Niday, Vol. 129, Ohio Senate Journal Index, p. 1747 (1959).

life and liberty interests are protected by it. Those original rights trigger due process protections at the beginning of the criminal justice system and continue to require due process protection until all processes within the system that are designed to insure reliability of convictions and sentences are complete. Ohio's criminal justice system ends with clemency review. Analogizing to this Court's ruling in *Evitts v. Lucey*, 469 U.S. 387 (1985), the Sixth Circuit found that some level of Due Process protection is required throughout the various stages of the criminal justice system but determined that "the degree to which each component forms an 'integral part' of the overall adjudicative[16] system determines the degree to which due process plays a role." *Woodard*, 107 F.3d at 1186.

Clemency review and the right to seek it are an integral part of Ohio's overall criminal justice system. The clemency power given to the Ohio Governor is one aspect of this system. The Ohio Supreme Court recognized in *Knapp v. Thomas*, 39 Ohio St. 377, 391-392, while discussing the need for the courts to refrain from interfering once the governor has issued a pardon, that the clemency power is an aspect of the separation of powers under the Ohio Constitution.[17] Executive clemency

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[16] The word "adjudicative" is here used in the broad and primary sense. To "adjudge" means "to decide or determine by law." WEBSTER'S DELUXE UNABRIDGED DICTIONARY (2d ed. 1979). It should not be read as a reference to a determination by the judiciary. The Sixth Circuit made clear that it referred to "proceedings made available by the government." *Woodard*, 107 F.3d at 1186.

[17] The U.S. President's clemency authority serves the same function. The Framers considered this during the 1787

review is the final step in Ohio's criminal justice system. The right to seek clemency is an aspect of the constitutional structure of Ohio government.[18]

The fact that the opportunity to ask for executive clemency is a right conferred by the constitutional structure of the government is so commonly understood in Ohio that it has always been accepted by the people, governors, and courts of the state. The consistent and unquestioning acceptance of the right to seek clemency is evidence of its indispensable and inextricable role in Ohio's criminal justice system. The Ohio Supreme Court recognized many years ago that seeking executive clemency is a right and perhaps the only remedy available to Ohio prisoners in some circumstances. The Ohio Supreme Court said in *In re Kline*, 70 Ohio St. 25, 29, 70 N.E. 511, 512 (1906), that a prisoner convicted under a law subsequently repealed had no redress available in the courts of

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Constitutional Convention. In determining the extent of the President's pardoning power a motion was made to exclude cases of treason and allow that aspect of clemency to be controlled by the Congress. The motion was defeated after discussion which noted that it would be inconsistent with the separation of powers to allow the legislative branch to take over that function. United States Constitution Convention (1787), *The Records of the Federal Convention of 1787*, Vol. II, pp. 626-627 (Max Farrand ed., Yale University Press) (1911).

[18] This Court has reached the same conclusion about the role of clemency in the federal system. *See Biddle v. Perovich*, 274 U.S. 480, 486 (1927) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.").

the state but, "The prisoner still has the right to appeal to executive clemency for a pardon." Ohioans sought clemency and Ohio governors granted and denied it before any legislation was enacted to regulate the application procedure.[19] Ohio courts have recognized consistently that the governor's clemency power exists independently of any legislation. *Knapp v. Thomas*, 39 Ohio St. at 392; *State v. Morris*, 55 Ohio St. 2d 101, 111, 378 N.E.2d 708, 714 (1978); *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d at 518, 644 N.E.2d at 378. Recourse to that power is the right of those facing execution in Ohio.

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[19] Pardon Records of Governor Rueben Woods 1851-1852. (On file with the Ohio Historical Society, State Archives); 1855 Executive Documents, Part I, Public Document No. 6, p. 58, Commutation of John Howley (Governor William Medill); 1863 Executive Documents, Part 1, Pardon Report p. 31, Commutation of Washington King (Governor David Tod); 1865 Executive Documents, Part 1, Report of Pardons and Reprieves, p. 264, Reprieve of Henry Ducolon (Governor Charles Anderson); 1866 Executive Documents, Part 1, Pardon Report, p. 314, one commutation granted (Governor J.D. Cox); 1867 Executive Documents, Part 1, Pardon Report, p. 177, one reprieve granted (Governor J.D. Cox); 1868 Executive Documents, Part 1, Pardon Report, p. 17, Commutation of Samuel Huling; Commutation of Sarah M. Victor (Governor R.B. Hayes); 1869 Executive Documents, Part 1, Pardon Report, p. 340 one commutation and three reprieves granted (Governor Rutherford B. Hayes); 1872 Executive Documents, Part 2, Governor's Report, p. 586, Commutation of Thomas Mimms (Governor Cox); 1874 Executive Documents, Part 1, Governor's Message, p. 23, Commutation of Hugh Daugherty (Governor William Allen); 1875 Executive Documents, Part 1, Governor's Message, p. 17, one commutation granted (Governor William Allen); 1878 Executive Documents, Part 2, Pardon Report, p. 568, Commutation of Thomas Mulhall (Governor Thomas L. Young).

b. The Availability of Clemency Review Unavoidably Impacts the Operation of the Earlier Stages of the Criminal Justice System and Thus is an Inextricable Part of that System

The fact that clemency is an integral part of Ohio's criminal justice system impacts every aspect of the legal proceedings that go before it. Jurors, judges, and prosecutors know that one final failsafe mechanism exists if mistakes are made, new evidence discovered, or the law is changed. The existence of the clemency process, however slightly, impacts close calls throughout the legal system.

In addition, the existence of clemency impacts the degree and expanse of judicial review. This Court has noted that "Clemency is . . . the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 411-412. And as the Sixth Circuit noted, this Court specifically relied upon the availability of clemency in denying Herrera an opportunity to obtain judicial relief on his actual innocence claim. (It is for precisely this reason that the clemency application process in Ohio is so important. It is during that process that the APA conducts the investigation and gathers the information that the governor needs in order to perform the function described in *Herrera*.)

Many circumstances that impact the fairness or reliability of a conviction or sentence can be corrected only through the clemency process. "The judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially."

United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).[20] Rules governing admissibility, waiver and procedural default, for example, prevent courts from considering facts that warrant the use of clemency. Ohio courts have rejected as grounds for judicial relief newly discovered evidence proving innocence or wrongful conviction, *Weaver v. State*, 120 Ohio St. 44, 165 N.E. 573 (1929); decriminalization of conduct for which one is imprisoned, *In re Kline*, 70 Ohio St. at 29, 70 N.E. at 512; and un-credited pre-trial detention. *State v. Summers*, 32 Ohio App. 2d 312, 316, 291 N.E.2d 489, 491 (1972). In each of these instances the courts have relied on clemency to correct the injustice. Were clemency not available, judicial review might expand to include areas now reserved for clemency consideration.

c. Clemency Review Enhances the Reliability of Convictions and Sentences

Clemency in Ohio serves as a final check on the fairness and reliability of criminal sentences. The fact that legislative regulation of the application process is permitted does not diminish the importance of clemency in Ohio's criminal justice system. The purpose of legislation regulating the

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[20] Petitioner cites *Wilson* incorrectly as authority for drawing a constitutional line between direct appeal and clemency, saying: "[State created direct appeal] turns on the courts' view of the defendant's guilt or innocence; [clemency] exists in spite of the courts' view of the defendant's guilt or innocence." [Pet. Br., p. 21] To the contrary, it is precisely because courts at times cannot consider critical facts essential to a reliable, final adjudication of a death sentence that clemency forms the final link in the total criminal justice process.

clemency application procedure is to create an orderly process for exercising the right to seek executive clemency and to insure that the governor receives accurate information. Ohio Constitutional Convention Debates (1850-51) p. 307. It is to be an aid to the Governor's exercise of the clemency power – not a hindrance. Legislative regulations are to insure the quality and reliability of information provided to the governor, *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 644 N.E.2d 369, and thus enhance the Governor's decision making ability. As is discussed below, the special death penalty regulations at issue in this case are a unique obstruction to the proper function of the clemency process.

d. Due Process Protection is Not Limited to Judicial Proceedings and Applies to Aspects of the Clemency Process

Petitioners mistakenly assume that the Fourteenth Amendment's guarantee that no state may "deprive any person of life, liberty, or property without due process of law" applies only to judicial proceedings. Noting that a direct appeal of right arises "at a very different stage in the criminal process," than does clemency review [Pet. Br. p. 19], Petitioners argue that due process protection does not apply to the right to seek clemency because, "one [appeal] is part and parcel of the judicial process; the other stands apart from the judicial process." [Pet. Br. p. 31]

Due process protections are not limited to judicial proceedings. The text of the Fourteenth Amendment guarantees that life and liberty will not be denied without

due process of law. "Due process of law" refers not only to judicial proceedings but to proceedings throughout the criminal justice system. In determining whether due process protections applied to an executive branch determination of whether a death row prisoner was sane and so could be executed, this Court noted that, "Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who had yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

Petitioners' reliance on the distinction between judicial and executive decision making does nothing to remove clemency from the textual guarantee of due process of law. Petitioners' recognition that clemency is "a different stage in the criminal process," admits the critical point in the Sixth Circuit's analysis – clemency is an integral part of Ohio's criminal justice system. As part of the "law" used to determine whether a death sentence will be carried out, it is entitled to some level of due process protection.

e. The Court Need Not Reach the Issue of Whether Counsel is Required in Clemency Proceedings in Order to Determine Whether Due Process Applies in any Manner to Ohio's Death Penalty Clemency Procedure.

Petitioners argue that "Clemency proceedings and direct appeals of right fall on different sides of a constitutional line . . . that explains why the Fourteenth Amendment grants criminal defendants a right to counsel at

trial . . . and on a direct appeal as of right but denies such a right for discretionary appeals as well as disciplinary proceedings." [Pet. Br. p. 20, citations omitted.] Petitioners confuse the issue of whether any process is due with the questions how much or what process is due. Some process is due in discretionary appeals. *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987), *quoting Ross v. Moffitt*, 417 U.S. 600, 616 (1974). Less process is due as a criminal case moves further away from the initial determination of guilt. This is in part because issues have been defined in prior proceedings and because as each level of review is passed, assuming effective assistance of counsel was provided and other rights observed, the risk of error is diminished. *Ross v. Moffitt*, 417 U.S. 600 (1974). It is not because somewhere in the criminal justice system a bright line exists beyond which no process is due. It is impossible to discern from Petitioner's reference where they believe this line lies. It cannot be between constitutionally required procedures and those that may be offered at the state's discretion. If it were there, no process would be due in direct appeals of right. It cannot be between judicial and non-judicial proceedings. If it were there, no process would be due in an executive determination of the condemned prisoner's sanity before execution can take place. The line Petitioners imagine does not exist.

Whether process is due and, if the answer is yes, to what extent, is determined by the circumstances of the situation. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Petitioners appear to argue that if the right to counsel does not attach, no process is due. That is not the case. Lesser or different kinds of process may be due and while there are

good arguments to be made for the right to counsel attaching under the circumstances of the case [*see* Brief *Amicus Curiae* of the American Bar Association], such a determination would be premature. The right to counsel may or may not attach but that does not answer the question of whether due process protections apply.

C. Mr. Woodard Has Protectable Due Process Interests Arising from Ohio Law

1. Mr. Woodard Has a State Created Liberty Interest in the Right to Seek Clemency

In addition to the due process protection that follows Mr. Woodard's life and liberty interest throughout the criminal justice system, Ohio has created an independent liberty interest in the right to seek clemency. Executive clemency review is an aspect of Ohio's criminal justice system that is intended to insure reliability in both convictions and sentences. It has been used by Ohio governors when prior stages in the system have failed to insure state-wide or intracase proportionality,[21] when newly discovered evidence exonerating or lessening the inmate's

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[21] Governor Edward F. Noyes, "Another year's experience in the matter of hearing and deciding applications for pardon has confirmed . . . that the law . . . should leave less discretion with the courts. It often happens that two prisoners work side by side in the Penitentiary, both sent there for precisely the same crime, one for one year and the other for ten." *Also see* 1873 Executive Documents, Part 2, p. 223; Governor C. William O'Neill, Commutation of Cleo Eugene Peters, Vol. 128, Ohio Senate Journal Index, p. 1472, #18 (1958); Governor Thomas Herbert, Commutation of Charles Ames, Vol. 123, Ohio Senate Journal Index, p. 1563 (1948).

culpability was found after the judgment was final and the courts could no longer consider the new information,[22] and when a general law was too harsh or simply unfair in its individual application.[23]

The Ohio Supreme Court has recognized that those convicted under Ohio laws have a right to seek clemency. *In re Kline*, 70 Ohio St. at 29, 70 N.E. at 512. Ohioans' liberty interest in clemency is not in the outcome of the process any more than an accused's liberty interest at trial is a guarantee of acquittal. Even an innocent person may be legally and constitutionally convicted and sentenced. The liberty interest is in having the clemency assessment made, for like a trial where there is no guarantee of the outcome, the clemency review and decision add one more tier of reliability to the criminal justice process to which the accused has submitted.

Ohio has established a unique capital clemency procedure and recognized the right to seek clemency. Once established, this system creates federally protected due

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[22] Governor Richard M. Bishop, pardon of Henry Rittle on recommendation of the prosecuting attorney, 1878 Executive Documents, Part 2, p. 567 (1878): "I am clearly satisfied that Rittle is not guilty of the crime as charged; of this I am satisfied from evidence obtained lately. Besides, he has served nearly ten years – a time long enough if he were actually guilty."

[23] Governor Richard F. Celeste, Ohio Senate Journal Index, Vol. 144, p. 21, (1991), Commutations of Rosalie Grant, Debra Brown, Elizabeth Green and Beatrice Lampkin, "All of these women were black, three of the four were from Hamilton County, and it was absolutely clear that the death penalty in cases involving women had not been administered fairly." Cleveland Plain Dealer, Sunday, January 5, 1997, 1997 WL 652567.

process interests in the right to meaningfully seek clemency – notwithstanding the fact that the federal constitution did not require the states to provide clemency review in the first instance. *Compare Hicks v. Oklahoma*, 447 U.S. 343 (1980) (state-created right to jury sentencing protected by due process); *Goss v. Lopez* (419 U.S. 565 (1975) (although federal constitution does not require states to establish school systems, once established, the interest in education enjoys due process protections); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process applies to parole revocation when state creates parole option); *and Evitts v. Lucey*, 469 U.S. 387 (1985) (due process requires effective assistance of appellate counsel even though federal constitution does not require states to provide appellate review of criminal convictions).

2. Discretion in the Executive Clemency Decision-Making Process Does Not Remove the Clemency Application Process from Due Process Protections

Petitioners claim that this Court's ruling in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, eliminates Mr. Woodard's liberty interest because the Ohio Governor, like the Connecticut parole board, has broad discretion to grant executive clemency. Petitioners misinterpret *Dumschat*.

Connecticut, like Ohio, recognizes "the right to seek commutation." *Dumschat*, 452 U.S. at 467. That right however was not at issue in Dumschat's case and had been given to *Dumschat* several times over. *Id.* at 461. Rather,

the Court in *Dumschat* considered only whether an explanation of the reasons for denying clemency was required. In rejecting the claim that Connecticut's clemency statute created a due process liberty interest in the sought after explanation, this Court identified the critical distinction that separates those situations that may implicate due process from those that likely do not:

> The statute [in Connecticut] imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board. . . . This contrasts dramatically with the Nebraska statutory procedures in *Greenholtz*, which expressly mandated that the Nebraska Board of Parole 'shall' order the inmate's release 'unless' it was decided that one of four specified reasons for denial was applicable. . . . A state cannot be required to explain its reasons for a decision when it is not required to act on prescribed grounds.

Id. at 466-467.

In Ohio's two step process, the APA functions more like the board in *Greenholtz v. Nebraska*, 442 U.S. at 8, than the one in *Dumschat*. It does not have unfettered discretion in how it conducts its investigation or the standards that must be applied in making its decision. Its process, like a trial, shapes the information that goes to the final decision maker. The Ohio statutory scheme meets all the criteria for finding a due process interest recognized in *Dumschat* and *Greenholtz*: it limits the procedure to be applied, it identifies relevant evidence to be considered, and it specifies the criteria and the substantive standard that the board must follow in making its recommendation.

Under Ohio law, the APA may recommend a pardon, commutation, or reprieve "if in its judgment there is reasonable ground to believe that granting a pardon, commutation, or reprieve to the convict or paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev. Code Ann. § 2967.03. By setting forth specific decisional criteria (whether the interests of justice would be furthered, and whether it would be consistent with society's welfare and security), and by requiring that the board's decision be reasonable, the statute confines the APA's discretion within the rule of law.

3. Mr. Woodard Has a State Life Interest in Ohio's Clemency Procedures

Eugene Woodard also has a state "life" interest in having access to Ohio's clemency decision maker. This life interest must receive due process protection independently of the due process protection afforded Mr. Woodard's "original" life interest that is protected throughout Ohio's criminal justice system.

It has long been the practice in Ohio to seek clemency review in nearly every capital case. Ohio governors have recognized as part of their executive duty the obligation to review capital cases. It was the current Governor's recognition of this obligation that generated the ill-considered administrative procedure at issue in this case.

In effect the right to a capital clemency review and decision is derived from "a mutually explicit understanding," *see Leis v. Flynt*, 439 U.S. 438, 442 (1979), between the people of Ohio and their government. Just as there can be

"an unwritten common law," in the conduct of employment relations that gives rise to a protected property interest, *Perry v. Sinderman*, 408 U.S. 593, 602 (1972), so too may there be an unwritten common law in the relationship of a government with its people that gives rise to a life interest.

The right to seek clemency, at least in Ohio, has special significance and independent weight in capital cases. Ohio Governors have frequently granted clemency in capital cases.[24] In doing so, or in deciding to allow an execution to go forward, Ohio Governors fulfill their function as the final check in Ohio's system of checks and balances that insures the fair and reliable implementation of Ohio's criminal laws and particularly the death penalty. Those who face execution in Ohio depend on executive clemency review as the final determination of their fate.

The Fourteenth Amendment to the United States Constitution says that no state shall "deprive any person of life . . . without due process of law." That protection extends to a life interest recognized by State law and practice as well as directly from the structure of the

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[24] "The electric chair was first used in 1897. Since that date, a total of 502 persons have been sentenced to death, of whom 315 were actually executed and 125 commuted." Memorandum from Harold J. Cardwell, Warden of the Ohio Penitentiary, on Electrocution Statistics, to John M. McElroy, Executive Assistant, State House, Columbus, Ohio. (July 7, 1970) (on file with the Ohio Historical Society, State Archives). Ohio's death penalty law was held unconstitutional in 1978, *Lockett v. Ohio*, 438 U.S. 586 (1978). There has not been an execution in Ohio since 1963.

Fourteenth Amendment text. Ohio's executive clemency decision is the final safeguard in a system designed to be implemented by the State's legislative, judicial, and executive branches. The purpose of the Death Penalty Clemency Procedure at issue in this case is "to ensure that information about each person for whom a pardon is considered will be available to the Governor, so that an informed decision may be made." *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d at 525, 644 N.E.2d at 378.

Ohio's Death Penalty Clemency Procedure is supposed to enhance the reliability of the Governor's decision by providing him with the facts he needs to make that decision. "The function of legal process, as that concept is embodied in the Constitution, and in the realm of fact finding, is to minimize the risk of erroneous decisions . . . the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Greenholtz*, 442 U.S. at 12. The fact finding process that leads to a life or death clemency decision must be designed to avoid the risk of error and must meet at least minimal due process standards.

D. This Case Should be Remanded to Determine Whether Ohio's Death Penalty Clemency Procedure Requires Due Process Protection.

This case illustrates the need for due process protections in the administrative investigation that Ohio has made the threshold procedure and the information-gathering mechanism of its clemency process. Ohio's 1994

Death Penalty Clemency Procedure, rather than enhancing reliability or assuring that Mr. Woodard's right to seek clemency is protected, does the opposite.

Mr. Woodard received a mere three days notice that a clemency interview would be conducted in his case, and only ten days notice of the clemency hearing. J.A. p. 4. Because the hearing was to be held while Mr. Woodard was still exhausting his judicial remedies, and because he had just obtained counsel, these time constraints prohibited Mr. Woodard from participating meaningfully in the clemency hearing. He was given no opportunity to prepare his life-and-death presentation. Indeed, had the inmate interview gone forward with three days notice, Mr. Woodard would not even have had an adequate opportunity to consult with his attorney prior to that single critical interview opportunity that the APA's procedure gave him.

But for the present litigation, Mr. Woodard's interest in a clemency hearing, and the interest of the state in an informed clemency decision, would have been irreparably compromised. Petitioners ignored Mr. Woodard's request for more time to prepare for the hearing. Petitioners failed to recognize that a stay of execution had been issued and, therefore, a clemency hearing was inappropriate at that time. Indeed, Petitioners did not respond at all to Mr. Woodard's communications. J.A. p. 4-5.

Had the clemency investigation proceeded, Ohio's failure to properly protect Mr. Woodard's interests would have been further aggravated by the restraints Ohio has placed on counsel's participation in the process. Ohio

specifically prohibits the presence or assistance of counsel during the clemency interview. Death Penalty Clemency Procedure § VI(C)(2), J.A. p. 11. It also delegates a decision on counsel's attendance and participation in the clemency hearing to the sole discretion of the parole board chair. Death Penalty Clemency Procedure § VI(D)(3), J.A. p. 12. The APA procedure turns death penalty clemency into a "meaningless ritual." *Douglas v. California*, 372 U.S. 353, 385 (1963).

This serves neither the goals of Ohio's criminal justice system nor the reliance of this Court on clemency as a means of correcting injustices that are beyond judicial review. *Herrera*, 506 U.S. at 411-412. Ohio's Death Penalty Clemency Procedure unfairly and needlessly impairs the quality of the information gathered during the investigation by limiting the inmate's opportunity to participate in the process. It thus impairs the function of clemency review in Ohio's criminal justice system and infringes on Mr. Woodard's life and liberty interests.

II. OHIO'S DEATH PENALTY CLEMENCY PROCEDURE IMPOSES AN UNCONSTITUTIONAL CONDITION ON MR. WOODARD'S FIFTH AMENDMENT RIGHTS.

A. The Facts Of This Matter Are Not Fully Developed And The Sixth Circuit's Remand Order Is Appropriate.

The Sixth Circuit Court of Appeals ordered that the district court, on remand, consider the possible effect of Ohio's Death Penalty Clemency Procedure on Mr. Woodard's Fifth Amendment rights. As with the due process

issue above, the Sixth Circuit's remand was wholly appropriate. The district court erred in dismissing (on the pleadings without discovery) Mr. Woodard's claim that his Fifth Amendment rights may be implicated by the operation of the Death Penalty Clemency Procedure. Factual development is essential to ascertain whether Mr. Woodard's Fifth Amendment rights are implicated, and what if any, steps must be taken to avert their violation.

A Court ruling on these issues would "be premature at this point" as "the district court must first find the facts" that will illuminate the Fifth Amendment question. *Woodard*, at 107 F.3d at 1193. In the absence of a factual record, the Court is left to decide " . . . abstract controvers[ies] over the use of . . . words", *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 15 (1945), in Ohio's Death Penalty Clemency Procedure. This endeavor is contrary to the Court's long recognition that important constitutional questions are best decided on the basis of factual records which tender the "underlying constitutional issues in clean-cut and concrete form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 584 (1947). *See also Baxter v. Palmagiano*, 423 U.S. 308, 323 (1976) (without a record respecting penalty, Ninth Circuit had acted prematurely in setting standard.).

A record is particularly essential in Fifth Amendment cases "because the constitutional issue posed depends upon a judgment as to how broad a protection is necessary to serve the values, purposes, and policies underlying the Fifth Amendment." *Piccirillo v. New York*, 400 U.S. 548, 558 (1971) (Douglas, J. dissenting from the denial of certiorari). Fifth Amendment questions simply cannot be resolved without assessing the risk of incrimination.

Unconstitutional conditions cannot be assessed here without a determination of whether Mr. Woodard "must risk self-incrimination to participate in the 'optional' clemency interview, and a full determination of the "nature of Petitioner APA's Clemency Procedures." *Woodard*, 107 F.3d at 1193. The State has failed to prove that no set of facts under Ohio's Death Penalty Clemency Procedure could require that he risk self-incrimination in order to participate in the clemency recommendation process; therefore, the Sixth Circuit's decision should be affirmed.

B. Ohio's Death Penalty Clemency Procedure Imposes An Unconstitutional Condition on the Exercise of Mr. Woodard's Fifth Amendment Right to Remain Silent.

Ohio's Death Penalty Clemency Procedure imposes an unconstitutional condition on Mr. Woodard's exercise of his Fifth Amendment right against self-incrimination.[25] It forces Mr. Woodard to chose between the right to remain silent in pursuit of further legal challenges to his conviction and sentence and the right to pursue clemency.[26]

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[25] The Fifth Amendment was made applicable to the states via the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[26] Petitioners argue that because Mr. Woodard did not seek a stay until seven weeks before his execution was scheduled, he is responsible for Petitioners' efforts to subject him to Ohio's Death Penalty Clemency Procedure with its uncounseled interview and hearing in absentia. Mr. Woodard did not apply for clemency: Petitioners forced the clemency hearing upon Mr.

1. The Doctrine of Unconstitutional Conditions is Applicable Here.

"The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right. It reflects the . . . view that government may not do indirectly what it may not do directly." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). The doctrine prevents the government from denying a right or benefit on the basis of the exercise of a constitutionally protected right and forbids conditioning the granting of a benefit on the waiver of a constitutional right. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Speiser v. Randall*, 357 U.S. 513 (1958).

Petitioners essentially concede not only the applicability of this doctrine, but they recognize that, if the Death Penalty Clemency Procedure requires Mr. Woodard to sacrifice a constitutional right, the Clemency Procedure is invalid. [Pet. Br. p. 30] The procedures demand just such a sacrifice. In order to be heard in what may be his only clemency interview, Mr. Woodard would have to

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Woodard. Mr. Woodard applied for a stay of execution with the Ohio Supreme Court fifty-two days before the scheduled execution. The Supreme Court issued a stay on the forty-fifth day before the execution date. *State v. Woodard*, 70 Ohio St. 3d 1429, 638 N.E.2d 580 (1994). This is not a case where Mr. Woodard delayed seeking a stay of execution until the eleventh hour and to say that Mr. Woodard somehow invited the clemency hearing is disingenuous.

sacrifice his Fifth Amendment rights since the very purpose of the interview is to garner information about the accused, the crime and any other matter that may bear on the APA's recommendation.

Ohio granted Mr. Woodard the right and benefit of a clemency process. Article III, Section 11 of the Ohio Constitution. The State has further provided Mr. Woodard with the rights and benefits of a clemency hearing and of a clemency interview. Ohio Rev. Code Ann. § 2967.07; Death Penalty Clemency Procedure Sections VI(B)(3), (C)(1) and (2), (D), (E), J.A. at 10, 11-13. In order to be heard in the clemency process, Mr. Woodard must participate in the clemency interview. Although Petitioners are silent on this issue, *amici* for Petitioners argue that Mr. Woodard's silence will be used against him in the clemency determination. Brief of *amicus* Criminal Justice Legal Foundation at 14; Brief of *amicus* States of California *et al.* at 3, 4, 22. The decision to participate in the clemency interview cannot be voluntary when a penalty is imposed for failing to participate. *See Simmons v. United States*, 390 U.S. 377, 393-394 (1968); *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

Petitioners' argument that the "Constitution nowhere prohibits States from placing conditions on the exercise of constitutional rights" [Pet. Br. p. 26] is simply wrong, as is their reliance on *McGautha v. California*, 402 U.S. 183 (1971). *McGautha* recognized that compelling a choice may be improper if the choice "impairs to an appreciable extent any of the policies behind the right." *McGautha*, at 213. In this case, Mr. Woodard's right to remain silent about ongoing litigation over his conviction and death sentence is directly infringed. Petitioners are compelling

Mr. Woodard's statements without any guarantee that the statements will not be used against him. Therefore, the Death Penalty Clemency Procedure impairs Mr. Woodard's Fifth Amendment right to remain silent.[27]

2. The Fifth Amendment is Implicated in the Death Penalty Clemency Procedure.

The intent and goal of the Fifth Amendment is "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). *See also McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Lefkowitz v. Turley*, 414 U.S. 70. This case is more egregious than those cited above because here there is ongoing litigation over the criminal case that gives rise to the clemency interview.

The Death Penalty Clemency Procedure requires the APA to conduct an investigation to amass information for the recommendation process.[28] Death Penalty Clemency

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[27] Petitioners' reliance on *Wyman v. James*, 400 U.S. 309 (1971), is likewise misplaced. The regulation at issue in *Wyman* was not an unconstitutional condition because the requirement for home visits to continue public assistance did not implicate the Fourth Amendment. *Id.* at 317. *Wyman* turned on the facts that the visit was not an "unreasonable intrusion," the visit was not made "by police or other uniformed authority," and there was no ongoing criminal investigation. *Id.* at 321-323. These are not the facts in this case.

[28] The Parole Board is a division of Petitioner APA. Its members are state agents, see *State v. Gallagher*, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), who are statutorily bound to conduct this official investigation. Ohio Rev. Code Ann. §§ 2967.07 and 2967.03. These actors properly fall within the contours of the Fifth Amendment. See *Mathis v. United States*, 391 U.S. 1 (1968) (incarcerated person being interviewed by a tax agent engaged Fifth Amendment concerns), and *Fare v. Michael C.*, 442 U.S. 707, 720 (1979) ("a probation officer is the employee of the State which seeks to prosecute the alleged offender"). Further, unlike the probationer in *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984), Mr. Woodard is physically restrained and was not free to leave the prison.

Procedure VI(B); J.A. A-9-10. The Sixth Circuit naturally concluded that such an investigation could present risks of incrimination for Mr. Woodard, its subject.

The investigation employs the interview of the inmate as a mechanism to gather facts. The clemency interview is tantamount to interrogation under this Court's decision in *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) because it will undoubtedly include questioning on the nature and circumstances of Mr. Woodard's case. Petitioners claim "the procedure allows Mr. Woodard to decide whether to make a statement and if so to determine how much or how little he wishes to say." [Pet. Br. p. 30] Nowhere do the procedures suggest that Mr. Woodard can refuse to answer questions put to him in the clemency interview.[29]

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[29] Indeed, Revised Code Section 2967.03 relates that the APA may investigate and examine or cause the investigation and examination of prisoners confined in state correctional institutions. Ohio Rev. Code Ann. § 5149.11 appears to authorize the APA and its hearing officers to compel testimony during such interview procedures. The Death Penalty Clemency Procedure cross-references these same statutory powers vested in this official interrogator, although not to R.C. 5149.11

The Fifth Amendment "privileges [Mr. Woodard] not to answer official questions put him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz*, 414 U.S. at 77. This privilege extends into the prison's walls. In *Baxter*, 308 U.S. at 316, the Court agreed that the protection of the privilege can extend to prison disciplinary proceedings. The privilege turns not on the type of proceeding, but "the nature of the statement or admission and the exposure which it invites." *Estelle v. Smith*, 451 U.S. 454, 462 (1982), citing *In re Gault*, 387 U.S. 1, 4 (1987).

Here, Mr. Woodard will be questioned about the crime for which he has been sentenced and concerning which there remains ongoing litigation.[30] The Sixth

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explicitly. Further, the Clemency Procedure relates that the prisoner will be asked to submit to a psychological or psychiatric evaluation, so clearly examinations are a contemplated feature of the Procedure.

[30] Ohio guarantees a right to participate in the clemency process. *In re Kline*, 70 Ohio St. 25, 70 N.E. 511. This guarantee is essential to fulfilling Petitioners' obligation to conduct a thorough investigation. Ohio Rev. Code Ann. § 2967.07. The Sixth Circuit noted that "it would seem to be in the state's own interest to encourage an open and frank [clemency] interview," *Woodard*, 107 F.3d at 1189, and that "the government cannot be said to have a legitimate purpose in limiting its 'encouragement' of clemency interviews to those inmates who relinquish their Fifth Amendment rights," *Id.* at 1191. As there is no legitimate purpose for conditioning participation in the clemency investigation on the waiver of Fifth Amendment rights, it is appropriate to apply the unconstitutional conditions doctrine.

Circuit described the problem posed by this premature, concurrent clemency proceeding as follows:

> [A] defendant who has not exhausted all post-conviction remedies still faces a risk of self-incrimination. If a defendant obtains a new trial, incriminating statements made during the appeal or post-conviction process, including those made during a clemency interview, might be admitted as evidence in that trial.

Woodard, 107 F.3d at 1192. Given that capital convictions and death sentences are overturned with some frequency in the collateral attack process,[31] this risk of incrimination from subsequent use is far from imaginary.

Further, the Death Penalty Clemency Procedure dictates that information will be collected from Mr. Woodard about his prior record and other matters. "An open-ended clemency interview could elicit incriminating statements regarding other acts unrelated to the prior conviction and could support new prosecutions for additional crimes." *Woodard*, 107 F.3d at 1192. The state could charge Mr. Woodard with any crime discovered during the interview. Thus, the risk of incrimination on this and other crimes is not trifling. *United States v. Doe*, 465 U.S.

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[31] Of the 3,834 individuals under sentence of death from 1977-1990, 1,146 had their sentences or convictions overturned. Michael D. Hintze, *"Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman"*, 24 Colum. Hum. Rts. L. Rev. 395, 410 (1993) (citing U.S. Justice Department statistics). The article finds over forty percent of all state-court capital judgments on first petition habeas corpus challenges were successful.

605, 610 (1984); *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892).

The Petitioners and their *amici* have offered no assurances that Mr. Woodard's Fifth Amendment rights will not be infringed by operation of the procedure. Petitioners argue that Mr. Woodard can exercise his Fifth Amendment right without prejudice. [Pet. Br. p. 30] *Amici* for Petitioners argue that any information gathered from the interview will be used against Mr. Woodard.[32] Indeed, the degree to which they offer different interpretations of the Death Penalty Clemency Procedure and what the State may choose to do in implementing it confirms the need for factual development and then close scrutiny of these concerns on remand.

Overall, it appears that Petitioners' position is that Mr. Woodard need not sacrifice his Fifth Amendment right as he "can always exercise [his] . . . right to silence during the initial clemency investigation. Then, assuming [he] . . . fail[s] to obtain collateral relief from the State or federal courts, [he] . . . can file a new clemency application and seek an interview at that point." [Pet. Br. p. 31] This ignores the plain language of Ohio's Death Penalty Clemency Procedure. Any subsequent clemency hearing

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[32] Both *amicus curiae* for Petitioners argue that Mr. Woodard's silence can be used to deny him clemency. Brief of *amicus* States of California *et al.* at 3, 4, 22 (the executive can consider "a claimant's declination of the opportunity to be interviewed by clemency authorities as a factor in reaching the clemency decision."); Brief of *amicus* Criminal Justice Legal Foundation at 14 ("If Ohio wishes to take into account respondent's failure to admit to his current or other crimes, it should be free to do so.").

or review will occur only at the discretion of the parole board chairperson. Death Penalty Clemency Procedure, Section VI(G), J.A. at 13-14. There is only one guaranteed clemency investigation, review, and hearing for Mr. Woodard: the one that was scheduled to occur before Mr. Woodard conducted any post-conviction investigation. Therefore, the decision to participate in the clemency interview is not a voluntary decision.

To the extent the Petitioners and their *amici* utilize *Baxter v. Palmagiano* to justify Ohio's clemency interview – the single, mandatory opportunity for an inmate to be heard in the clemency process – their reliance is misplaced. As the Sixth Circuit noted, *Baxter* is properly distinguished on several grounds: the inquiry conducted was for totally different purposes; the burden of proof was on the state; and "[t]he necessity of speaking openly to the state . . . is much greater in the clemency context [than in a prison disciplinary hearing]." *Woodard*, 107 F. 3d at 1192. Moreover, the life and death stakes of a clemency hearing clearly surpass any prison disciplinary hearing. But even if *Baxter* is somehow applicable, the Court there reaffirmed that any adverse inference drawn could not be used as a sole basis to deny the government benefit without violating the Fifth Amendment line of unconstitutional conditions cases. *Baxter*, 425 U.S. at 318.

Further, *Baxter* did not suggest that the state could compel answers inside the prison walls: if the state compelled answers over the defendant's Fifth Amendment objection, use immunity would be required. *Baxter*, 425 U.S. at 316, 318. Nor can the inmate "be required to waive such immunity" by prison officials. *Id.* Similarly, if the state sought to use silence at the disciplinary proceeding

in any future criminal proceeding, Fifth Amendment concerns would arise. *Id.* at 317. Rather than sweeping Fifth Amendment concerns aside in the context of prison inquiries, *Baxter* reaffirms that these concerns do survive within the prison walls.

Ohio's Death Penalty Clemency Procedure is at best unclear as to whether Mr. Woodard's participation in the APA's interview may be, when implemented, conditioned on a waiver of his Fifth Amendment rights. More facts are needed to fully analyze and resolve this important issue; therefore, the Sixth Circuit properly remanded the case and its order should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender
Counsel of Record

GREGORY W. MEYERS
Senior Assistant Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394

S. ADELE SHANK
P.O. Box 8053
Columbus, Ohio 43201
(614) 326-1217

MICHAEL J. BENZA
1698 Oakmount Road
South Euclid, Ohio 44121-4045
(216) 297-0929

APPENDIX

1. The Eighth Amendment to the United States Constitution provides:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Article III, Section 21 of the Ohio Constitution provides:

Article III, Section 21

When required by law, appointments to state office shall be subject to the advice and consent of the Senate. All statutory provisions requiring advice and consent of the Senate to appointments to state office heretofore enacted by the General Assembly are hereby validated, ratified and confirmed as to all appointments made hereafter, but any such provision may be altered or repealed by law.

3. Section 121.02 of the Ohio Revised Code provides, in pertinent part:

The following administrative departments and their respective directors are hereby created:

(O) The department of rehabilitation and correction, which shall be administered by the director of rehabilitation and correction;

4. Section 121.03 of the Ohio Revised Code provides, in pertinent part:

The following administrative department heads shall be appointed by the governor, with the advice and consent of the senate, and shall hold their offices during the term of the appointing governor, except as provided in division (W) of this section, and are subject to removal at the pleasure of the governor.

(Q) The director of rehabilitation and correction;

5. Section 2967.03 of the Ohio Revised Code provides, in pertinent part:

The adult parole authority may exercise its functions and duties in relation to the pardon, commutation of sentence, or reprieve of a convict upon direction of the governor or upon its own initiative. It may exercise its functions and duties in relation to the parole of a prisoner who is eligible for parole upon the initiative of the head of the institution in which the prisoner is confined or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which the prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state correctional institutions concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships, and any other matters affecting their fitness to be at liberty without being a threat to society.

The authority may recommend to the governor the pardon, commutation of sentence, or reprieve of any convict or prisoner or grant a parole to any prisoner for

whom parole is authorized, if in its judgment there is reasonable ground to believe that granting a pardon, commutation, or reprieve to the convict or paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society. However, the authority shall not recommend a pardon or commutation of sentence of, or grant a parole to, any convict or prisoner until the authority has complied with the applicable notice requirements of sections 2930.16 and 2967.12 of the Revised Code and until it has considered any statement made by a victim or a victim's representative that is relevant to the convict's or prisoner's case and that was sent to the authority pursuant to section 2930.17 of the Revised Code and any other statement made by a victim or a victim's representative that is relevant to the convict's or prisoner's case and that was received by the authority after it provided notice of the pendency of the action under sections 2930.16 and 2967.12 of the Revised Code. If a victim or victim's representative appears at a full board hearing of the parole board and gives testimony as authorized by section 5149.101 of the Revised Code, the authority shall consider the testimony in determining whether to grant a parole. The trial judge and prosecuting attorney of the trial court in which a person was convicted shall furnish to the authority, at the request of the authority, a summarized statement of the facts proved at the trial and of all other facts having reference to the propriety of recommending a pardon or commutation, or granting a parole, together with a recommendation for or against a pardon, commutation, or parole, and the reasons for the recommendation. The trial judge of the court, and the prosecuting attorney in the

trial, in which a prisoner was convicted may appear at a full board hearing of the parole board and give testimony in regard to the grant of a parole to the prisoner as authorized by section 5149.101 of the Revised Code. All state and local officials shall furnish information to the authority, when so requested by it in the performance of its duties.

6. SECTION 2967.12 OF THE OHIO REVISED CODE PROVIDES, IN PERTINENT PART:

(A) Except as provided in division (G) of this section, at least three weeks before the adult parole authority recommends any pardon or commutation of sentence, or grants any parole, the authority shall send a notice of the pendency of the pardon, commutation, or parole, setting forth the name of the person on whose behalf it is made, the offense of which the person was convicted, the time of conviction, and the term of the person's sentence, to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the person was found. If there is more than one judge of that court of common pleas, the authority shall send the notice to the presiding judge.

(B) If a request for notification has been made pursuant to section 2930.16 of the Revised Code, the adult parole authority also shall give notice to the victim or the victim's representative prior to recommending any pardon or commutation of sentence for, or granting any parole to, the person. The authority shall provide the notice at the same time as the notice required by division (A) of this section and shall include in the notice the information required to be set forth in that notice. The

notice also shall inform the victim or the victim's representative that the victim or representative may send a written statement relative to the victimization and the pending action to the adult parole authority and that, if the authority receives any written statement prior to recommending a pardon or commutation or granting a parole for a person, the authority will consider the statement before it recommends a pardon or commutation or grants a parole. If the person is being considered for parole, the notice shall inform the victim or the victim's representative that a full board hearing of the parole board may be held and that the victim or victim's representative may contact the office of victims' services for further information.

(C) When notice of the pendency of any pardon, commutation of sentence, or parole has been given as provided in division (A) of this section and a hearing on the pardon, commutation, or parole is continued to a date certain, the authority shall give notice by mail of the further consideration of the pardon, commutation, or parole to the proper judge and prosecuting attorney at least ten days before the further consideration. When notice of the pendency of any pardon, commutation, or parole has been given as provided in division (B) of this section and the hearing on it is continued to a date certain, the authority shall give notice of the further consideration to the victim or the victim's representative in accordance with section 2930.03 of the Revised Code.

(D) In case of an application for the pardon or commutation of sentence of a person sentenced to capital punishment, the governor may modify the requirements of notification and publication if there is not sufficient

time for compliance with the requirements before the date fixed for the execution of sentence.

(F) The failure of the adult parole authority to comply with the notice provisions of division (A), (B), or (C) of this section or the failure of the parole board to comply with the notice provisions of division (E) of this section do not give any rights or any grounds for appeal or post-conviction relief to the person serving the sentence.

7. Section 5120.01 of the Ohio Revised Code provides, in pertinent part:

The director of rehabilitation and correction is the executive head of the department of rehabilitation and correction. All duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under such rules and regulations as he prescribes, and shall be under his control. The director shall have power to control transfers of inmates between the several state institutions included under section 5120.05 of the Revised Code.

8. Section 5149.11 of the Ohio Revised Code provides, in pertinent part:

In the exercise of any of the powers vested in the adult parole authority, the chief of the authority, any member of the board, or any hearing officer may administer oaths and in the name of the authority may issue subpoenas and subpoenas duces tecum. The authority may compel the attendance of witnesses and the production of records and papers of all kinds and description including any and all books, accounts, documents, memorandums, and transcripts of testimony, pertaining to any

inquiry within the powers and duties of the authority. Upon the failure of any person to comply with any order of the authority or any subpoena or subpoena duces tecum lawfully issued, or upon the refusal of any witness to testify to any matter regarding which he may be lawfully interrogated, a judge of the court of common pleas of any county in this state, on the application of the authority, shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from a court of common pleas or a refusal to testify therein.

9. Section 5120:1-1-15 of the Ohio Administrative Code provides, in pertinent part:

(A) All applications for pardon, reprieve or commutation of sentence shall be made in writing to the Chief of the Adult Parole Authority.

(B) When an application for a pardon, reprieve or commutation of sentence is filed with the Chief of the Adult Parole Authority, the authority shall conduct such investigation as is necessary and make a recommendation to the governor. A hearing may be held at the discretion of the Parole Board. Such hearing if held, shall be before at least a majority of the members of the Parole Board.

(C) At least three weeks prior to any hearing held to consider pardon, reprieve or commutation of sentence, notice of such hearing shall be sent to the prosecuting attorney and the judge of the Court of Common Pleas of the county in which the indictment against the applicant was found, and, if required by section 2967.12 of the Revised Code, to the victim or victim's family. Where

there is more than one judge of the court of common pleas, the notice shall be sent to the presiding judge.

(D) Such notice shall contain the following:

(1) The name of the applicant;

(2) The crime for which the applicant was convicted;

(3) The date of conviction;

(4) The term of sentence.

(E) In the event the hearing is continued, notice of such continuance and the date of the continued hearing shall be sent to all interested parties at least ten (10) days prior to the date of the continued hearing.

(F) In the event the decision of the Parole Board is to recommend for or against pardon, reprieve, or commutation of sentence, such recommendation shall be forwarded to the Governor, together with a brief statement of the facts, the grounds for such recommendation, and the record or minutes of the case.

(G) The decision of the Parole Board to recommend for or against pardon, reprieve or commutation of sentence shall be within its sole discretion and shall not be subject to administrative review.

(H) If the adult parole authority receives an application for pardon, commutation or reprieve for a person for whom executive clemency was denied less than two years earlier than the date the subsequent application was received, and the authority does not believe that the application contains any grounds that were not or could

not have been presented in the earlier application, the parole authority may forward the application to the governor with the recommendation that it be denied on the basis of the earlier review and denial. In such a case, no hearing and no further investigation shall be necessary unless specifically requested by the governor.

(I) The adult parole authority shall consider a case for pardon or commutation only upon the application of the convicted person or his counsel or at the direction of the governor.

STATE DEATH PENALTY CLEMENCY PROCEDURES

Table 1

STATES THAT HAVE GIVEN THE CLEMENCY POWER EXCLUSIVELY TO A BOARD. (SIX STATES)

Connecticut	Const., Art. IV, Sec. 13, Conn. Gen. Stat. Sec. 321-18-26 (1992)
Georgia	Const., Art. IV, Sec. 2, p 2, Ga.Code Ann. Secs. 42-9-20, 42-9-42 (1994 and Supp. 1995)
Idaho	Const., Art. IV, Sec. 7, Idaho Code Secs. 20-240 (Supp.1995), 67-804 (1989)
Nebraska	Const., Art. IV, Sec. 13, Neb. Rev. Stat. Secs. 83-1, 127 to 83-1, 132 (1994)
Nevada	Const., Art. V, Sec. 13, Nev. Rev. Stat. Sec. 213.080 (1991)
Utah	Const., Art. VII, Sec. 12, Utah Code Ann. Sec. 77-27-5.5 (1995)

Table 2

STATES THAT USE A COMBINATION OF A BOARD AND EXECUTIVE DECISION. (EIGHTEEN STATES)

Arizona	Const., Art. V, Sec. 5, Ariz. Rev. Stat. Ann. Secs. 31-443, 31-445 (1986 and Supp.1995)
Arkansas	Const., Art. VI, Sec. 18, Ark. Code Ann. Secs. 5-4-607, 16-93-204 (1987 and Supp.1993)
Delaware	Const., Art. VII, Sec. 1, Del. Code Ann., Tit. 29, Sec. 2103 (1991)
Florida	Const., Art. IV, Sec. 8, Fla. Stat. Sec. 940.01 (Supp.1991)

Illinois	Const., Art. V, Sec. 12, Ill. Rev. Stat., ch. 38, p 1003-3-13 (1992)
Indiana	Const., Art. V, Sec. 17, Ind. Code Secs. 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1992)
Kansas	Const., Art. I, Sec. 7, Ann. Code Sec. 22-3701 (1988)
Louisiana	Const., Art. IV, Sec. 5(E), La. Rev. Stat. Ann. Sec. 15:572 (West 1992)
Maryland	Const., Art. II, Sec. 20, Md. Ann. Code, Art. 27, Sec. 77 (1992), and Art. 41, Sec. 4-513 (1990)
Mississippi	Const., Art. V, Sec. 124, Miss. Code Ann. Sec. 47-5-115 (1981)
Montana	Const., Art. VI, Sec. 12, Mont. Code Ann. Secs. 46-23-301 to 46-23-316 (1991)
New Hampshire	Const., pt. 2, Art. 52, N.H. Rev. Stat. Ann. Sec. 4:23 (1988)
Ohio	Const., Art. III, Sec. 11, Ohio Rev. Code Ann. Secs. 2967.02 to 2967.12 (1987 and Supp.1991)
Oklahoma	Const., Art. VI, Sec. 10, Okla. Stat., Tit. 21, Sec. 701.11a (1990)
Pennsylvania	Const., Art. IV, Sec. 9, (Purdon 1994)
South Dakota	Const., Art. IV, Sec. 3, S.D. Codified Laws Secs. 23A-27A-20 to 23A-27A-21, 24-14-1 (1988)
Tennessee	Const., Art. III, Sec. 6, Tenn. Code Ann. Secs. 40-27-101 to 40-27-109 (1995)
Texas	Const., Art. IV, Sec. 11, Tex. Code Crim. Proc. Ann. Sec. 48.01 (Vernon 1979 and Supp. 1995)

Table 3

STATES WHERE THE GOVERNOR MUST HAVE A FAVORABLE RECOMMENDATION IN ORDER TO GRANT CLEMENCY. (NINE STATES)

Arizona	Const., Art. V, Sec. 5, Ariz. Rev. Stat. Ann. Secs. 31-402 (1986 and Supp. 1995)
Delaware	Const., Art. VII, Sec. 1 (1991)
Florida	Const., Art. IV, Sec. 8, Fla. Stat. Sec. 940.01 (1996)
Indiana	Const., Art. V, Sec. 17, Ind. Code Secs. 11-9-2-1 to 11-9-2-4, 35-38-6-8 (1996)
Louisiana	Const., Art. IV, Sec. 5(E), La. Rev. Stat. Ann. Sec. 15:572 (1997)
Montana	Const., Art. VI, Sec. 12, Mont. Code Ann. Secs. 46-23-301 to 46-23-316 (1991)
Oklahoma	Const., Art. VI, Sec. 10, Okla. Stat. Title 57, Sec. 332.2 (1996)
Pennsylvania	Const., Art. IV, Sec. 9, 37 Pa. Code § 81.101 (Purdon 1994)
Texas	Const., Art. IV, Sec. 11, Tex. Code Crim. Proc. Ann. Sec. 48.01 (Vernon 1979 and Supp. 1995)

Table 4

STATES THAT REQUIRE THE GOVERNOR TO RECEIVE A NON-BINDING RECOMMENDATION FROM THE BOARD BEFORE MAKING A CLEMENCY DECISION. (NINE STATES)

Arkansas	Const., Art. VI, Sec. 18, Ark. Code Ann. Secs. 5-4-607, 16-93-204 (1987 and Supp. 1993)

Illinois	Const., V, Sec. 12, Ill. Rev. Stat., ch. 38, p 1003-3-13 (1992)
Kansas	Const., Art. I, Sec. 7, Kan. Ann. Code Sec. 22-3701 (1988)
Maryland	Const., Art. II, Sec. 20, Md. Ann. Code Art. 27, Sec. 77 (1992), Art. 41, Sec. 4-513 (1990)
Mississippi	Const., Art. V, Sec. 124, Miss. Code Ann. Sec. 47-5-115 (1981)
New Hampshire	Const., pt. 2, Art. 52, N.H. Rev. Stat. Ann. Sec. 4:23 (1988)
Ohio	Const., Art. III, Sec. 11, Ohio Rev. Code Ann. Secs. 2967.02 to 2967.12 (1987 and Supp. 1994)
South Dakota	Const., Art. IV, Sec. 3, S.D. Codified Laws Sec. 23A-27A-20 to 23A-27A-21, 24-14-1 (1988)
Tennessee	Const., Art. III, Sec. 6, Tenn. Code Ann. Secs. 40-27-101 to 40-27-109 (1995)

Table 5

STATES WHERE THE GOVERNOR HAS THE SOLE RESPONSIBILITY FOR CONSIDERING CLEMENCY APPLICATIONS, ALTHOUGH THE GOVERNOR MAY DIRECT A BOARD TO INVESTIGATE THE APPLICATION. (FOURTEEN STATES)

Alabama	Const., Amend. 38, Ala. Code Sec. 15-22-27 (1982)
California	Const., Art. V, Sec. 8, Cal. Govt. Code Ann. Sec. 12030(a) (West 1995)
Colorado	Const., Art. IV, Sec. 7, Colo. Rev. Stat. Secs. 16-17-101, 16-17-102 (1989)

Kentucky	Const., Sec. 77 (1988)
Missouri	Const., Art. IV, Sec. 7, Mo. Rev. Stat. Secs. 217.220 (Vernon 1995), 552.070 (Vernon 1987)
New Jersey	Const., Art. V, Sec. 2, p 1, N.J. Stat. Ann. Secs. 2A:167-4, 2A:167-12 (West 1985)
New Mexico	Const., Art. V, Sec. 6, N.M. Stat. Ann. Sec. 31-21-17 (1992)
New York	Const., Art. IV Sec. 4 (1987)
North Carolina	Const., Art. III, Sec. 5(6), N.C. Gen. Stat. Secs. 147-23 to 147-25 (1987)
Oregon	Const., Art. V, Sec. 14, Ore. Rev. Stat. Secs. 144.640 to 144.670 (1991 and Supp. 1995)
South Carolina	Const., Art. IV, Sec. 14, S.C. Code Ann. Secs. 24-21-910 to 24-21-1000 (1977 and Supp.1991)
Virginia	Const., Art. V, Sec. 12, Va. Code Ann. Sec. 53.1-230 (1995)
Washington	Const., Art. III, Sec. 9, Wash. Rev. Code Sec. 10.01.120 (1992)
Wyoming	Const., Art. IV, Sec. 5, Wyo. Stat. Sec. 7-13-801 (1990)

Table 6

STATES WHERE THE GOVERNOR SITS ON THE CLEMENCY BOARD. (THREE STATES)

Florida	Art. IV § 8, Fla. Stat. Ann. § 940.01 (1996)
Nebraska	Art. 4 § 13, Neb. Rev. Stat. § 83-1 (1996)

Nevada	Const. Art. 4 § 14, Nev. Rev. Stat. 213.005 to 213.100 (1997)

Table 7

STATES THAT ALLOW A HEARING OF SOME SORT TO REVIEW THE EVIDENCE OF THE INMATE. (THIRTY-FIVE STATES)

Alabama	Ala. Code Sec. 15-22-23(a)(1); 15-22-25 (1982)
Arizona	Ariz. Admin. Code R5-4-601 - 603
Arkansas	Ark. Code Ann. § 16-93-204 (1987 and Supp.1993); Board Rules 4, 6
California	Cal. Code Ann. § 6-4812; Cal. Code Regs. tit. 15, § 2247 (West 1995)
Colorado	Dept. of Corr. R. 203-2 (IV)(C)(E)
Connecticut	Conn. Gen. Stat. Sec. 321-18-24 et seq. (1992)
Delaware	Board of Pardons Rule 1
Florida	Rules of Executive Clemency R. 15
Georgia	78 Op. Att'y Gen. 44 (1978); Ga. Admin. Code § 475-3.10(2)(b)
Idaho	Idaho Admin. Code § 50.01.01-250.04, 450.08
Illinois	730 Ill. Comp. Stat., 5/3-3-13(c); Bd. Guideline R. (B)(2)
Indiana	Ind. Code Secs. 11-9-2-2 to 11-9-2-3 (1992)
Kansas	Kan. Admin. Code § 45-14-1
Louisiana	Clemency R. 3; La. Rev. Stat. Ann. § 15:573 (West 1992)

Maryland	Md. Admin. Code §§ 12.08.01.06 to .12
Mississippi	Miss. Code Ann. Sec. 47-7-17; 47-7-31 (1981)
Montana	Mont. Code Ann. § 46-23-301 (1991)
Nebraska	Neb. Rev. Stat. § 83-1, 127 to 83-1, 132 (1994); see also *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993)
Nevada	Nev. Admin. Code § 213.190
New Hampshire	N.H. Rev. Stat. Ann. § 4:21 (1988)
New Mexico	N.M. Stat. Ann. § 31-21-17; 31-21-24 (1992); Executive Guide IV(3)
New York	N.Y. Exec. Law § 2-A (notes)
North Carolina	Telephone interview by Robert K. Lowe with Executive Clemency Board Oct. 12, 1995
Ohio	Death Penalty Clemency Procedure VI(C), (D)
Oklahoma	Okla. Stat., 57-7-332.2 (1990)
Oregon	Ore. Rev. Stat. § 144. 054, 144.650 (1991 and Supp. 1995)
Pennsylvania	37 Pa. Code § 81-211
South Carolina	S.C. Code Ann. § 24-21-910 to 24-21-1000 (1996)
South Dakota	S.D. Codified Laws § 24-14-4; 24-13-1; S.D. Admin R. 17:60:05:01
Tennessee	Tenn. Code Ann. § 40-28-103 et seq. (1995)

Texas	37 Tex. Admin. Code § 147.1 (West 1995)
Utah	Utah Code Ann. § 77-27-5.5 (1995)
Virginia	Parole Bd. Policy VI(B)
Washington	Bylaw of the Board of Clemency and Pardons 3.010
Wyoming	Board of Parole R. II; III

Table 8

STATES THAT PROVIDE FOR PUBLIC HEARINGS TO REVIEW CLEMENCY APPLICATIONS. (SIXTEEN STATES)

Alabama	Code Sec. 15-22-23
Arkansas	Code Sec. 16-93-703
Delaware	Const., VII, Sec. 1, Bd. Rule 5
Georgia	Information Guide of the State Board of Pardons and Parole
Idaho	IDAPA 50.01.01-250 and 450
Illinois	Guidelines for Executive Clemency Hearings (C)
Indiana	220 IAC 1.1-2.2
Louisiana	La. Rev. Stat. Ann. § 15:573 (West 1992)
Montana	Mont. Code Ann. Sec. 46-23-302
Nebraska	*Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993)
Pennsylvania	37 Pa. Code Sec. 81.63
South Dakota	Codified Laws Sec. 24-14-16
Tennessee	Code Ann. Sec. 40-28-105 (all votes must be in public)

Texas	37 Tex. Admin. Code §§ 145 and 147 West 1995, Board of Pardon and Parole Rule 147.1
Utah	R671-312-3 and R671-315-1
Washington	Board Bylaw 3.010

Table 9

STATES THAT MAY ALLOW WITNESSES FOR BOTH SIDES TO PRESENT WRITTEN OR ORAL STATEMENTS DURING THE CLEMENCY PROCESS. (THIRTY-FOUR STATES)

Alabama	Code Sec. 15-22-23
Arizona	Admin. Code R5-4-601 to 603
Arkansas	Memorandum from Deborah Sallings Arkansas Capital Resource Center, to Michael Benza (Feb. 15, 1995) (on file with the Office of the Ohio Public Defender)
California	15 CAC 2245 et seq., and Code 6-4812
Colorado	DOC 203-2 IV(C)
Connecticut	321-18-24a-30 and past practice
Delaware	Board of Pardon rule 6
Florida	Board rule 15
Georgia	Information guide of the Board of Pardons and Paroles
Idaho	IDAPA 50.01.01:250 and 450
Illinois	Guidelines for Executive Clemency
Indiana	Code 11-9-2-2
Louisiana	La. Rev. Stat. Ann. § 15:572.4(B)(2) (West 1997)

Maryland	Code 12.08.01.15 to .18
Mississippi	Telephone interview by Robert K. Lowe, paralegal with Mississippi Public Defender office (Nov. 7, 1995)
Missouri	Missouri Capital Case Resource Manual and Code 552.070
Montana	Code Ann. Sec. 46-23-302
Nebraska	*Otey v. Hopkins*, 5 F.3d 1125 (C.A.8 (Neb.) 1993)
Nevada	213.010
New Hampshire	4:28
New Jersey	Executive Clemency provision XXIV
New York	Art. 2-A Exec. Law - notes
Ohio	Clemency procedure(at Board's discretion)
Oklahoma	Memorandum from Randy Bauman, Oklahoma Indigent Defense System, to Michael Benza (Feb. 18, 1995) (on file with the Office of the Ohio Public Defender)
Oregon	Code Sec. 255-37-005
Pennsylvania	37 Pa. Code Sec. 81.93
South Carolina	Code Ann. Sec. 24-21-50
South Dakota	Codified Laws 24-11-6
Tennessee	Code Ann. 40-28-106
Texas	Board rule 147.5
Utah	Admin. R671-312-2
Virginia	Walter A. McFarlane, The Clemency Process in Virginia, 27 U. Rich. L. Rev. 241 (1993)

Washington	Board Bylaw 3.080
Wyoming	W.S. 7-13-402

Table 10

STATES THAT PERMIT COUNSEL, IF RETAINED, TO BE INVOLVED IN THE CLEMENCY PROCESS. (THIRTY-TWO STATES)

Alabama	Al. Code Sec. 15-22-23;
Arizona	Az. Admin. Code R5-4-601 to 603
Arkansas	Executive Clemency R. 2; Memorandum From Deborah Sallings, Arkansas Capital Resource Center, to Michael Benza (Feb. 15, 1995) (on file with the Office of the Ohio Public Defender)
California	15 CAC 2251 and 2256 and Code 6-4852.08
Connecticut	Conn. 321-18-24a-30 and past practice
Delaware	Board of Pardon rule 6
Florida	Board rule 15
Georgia	Information guide of the Board of Pardons and Paroles
Idaho	IDAPA 50.01.01:250 and 450
Illinois	Guidelines for Executive Clemency and Code 5/3-3-13
Indiana	In. Code 11-9-2-2
Louisiana	La. Rev. Stat. Ann. § 15:572.7 (West 1997)
Maryland	Md. Code 12.08.01.15 to .18

Mississippi	Miss. Code 47-7-31
Missouri	Missouri Capital Case Resource Materials
Montana	Mont. Code Ann. Sec. 46-23-302
Nebraska	*Otey v. Hopkins*, 5 F.3d 1125 (C.A.8 (Neb.) 1993)
Nevada	Telephone interview by Robert K. Lowe with Nevada Public Defender office (Sept. 21, 1995)
New Jersey	Executive Clemency provision XXIV
New York	N.Y. Exec. Law § 2-A (notes)
North Carolina	Telephone interview with Executive Clemency Board (Oct. 12, 1995)
Oklahoma	Memorandum from Randy Bauman, Oklahoma Indigent Defense System, to Michael Benza (Feb. 18, 1995) (on file with the Office of the Ohio Public Defender)
Oregon	Ore. Code Sec. 255-37-005
Pennsylvania	37 Pa. Code Sec. 81.82
South Carolina	S.C. Code Ann. Sec. 24-21-50
South Dakota	S.D. Codified Laws 24-11-6
Tennessee	Tenn. Code Ann. § 40-28-106
Texas	Board rule 147.5
Utah	Utah Admin. R671-312-2
Virginia	Walter A. McFarlane, The Clemency Process in Virginia, 27 U. Rich. L. Rev. 241 (1993)

Washington	Board Bylaw 3.080
Wyoming	W.S. 7-13-402

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California	15 CAC 2251
Florida	Fla. State. Ann. § 27.51
Tennessee	Tenn. Code Ann. § 40-28-106(b)(4)

(13)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

OHIO ADULT PAROLE AUTHORITY, et al.
Petitioners,

v.

EUGENE WOODARD,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

BETTY D. MONTGOMERY
Attorney General

WILLIAM A. KLATT
First Assistant Attorney General
Counsel of Record
JEFFREY S. SUTTON
State Solicitor
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

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ARGUMENT

I. OHIO'S EXECUTIVE CLEMENCY PROCEDURE DOES NOT OFFEND DUE PROCESS.

A. Mr. Woodard does not seem to dispute Ohio's analytical framework for assessing his due process claim, just its application to the facts of this case. He first argues (Resp. Br. 13-18) that the seriousness of his sentence implicates a freestanding life interest that is protected by federal law and is therefore subject to the procedural safeguards of the due process clause. At one level, Mr. Woodard is correct. A capital sentence is different from other criminal sentences. But that difference merely explains why the Constitution in general and the due process clause in particular establish so many additional procedural safeguards before a death sentence (as opposed to another criminal sentence) may be imposed. *See, e.g., Skipper v. South Carolina*, 476 U.S. 1 (1986). Once those extra protections have been provided and once an individual has received a capital sentence in accordance with them, the life interest protected by the clause has been procedurally safeguarded.

Nor does this approach render Mr. Woodard "legally dead." (Resp. Br. 13). It just establishes that with respect to the requirements of due process, the life interest Mr. Woodard had before killing Mani Akram has been given the process it is due. *See Herrera v. Collins*, 506 U.S. 390, 399-400 (1993). That does not make Mr. Woodard a stranger to our laws. He still may assert a host of other constitutional claims if the State makes the mistake of violating other constitutional guarantees. And he still may bring due process claims if the capital sentence is not meted out in a way contemplated at the time of sentence or if the State itself creates a new life or liberty interest and arbitrarily takes it away. Ohio, however, has not crossed these other constitutional lines.

Far from undermining this analysis, *Ford v. Wainwright*, 477 U.S. 399 (1986), actually supports it. The decision illustrates the kind of federal life interest that the Constitution protects even after an individual has received a properly-imposed capital sentence. At stake in *Ford* was whether a State could lawfully execute a person who became insane after trial. In holding that it could not, the Court prevented the State from imposing a punishment not reasonably contemplated at the time of conviction -- the execution of an incompetent individual. This is precisely the type of federal life or liberty interest that may arise after a criminal conviction and therefore require new procedural protections. *See Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (finding that inmate had a liberty interest in refusing the involuntary administration of psychotropic drugs). But since "an inmate has 'no constitutional or inherent right' to commutation of his sentence," *Connecticut Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (quoting *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979)), whether before or after conviction, clemency simply is not an equivalent life or liberty interest. *See Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2297, 2297 n.4 (1995) (the "Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed") (quotation omitted).

B. Mr. Woodard and his *amici* next argue (Resp. Br. 18-27) that clemency creates a protectible life or liberty interest because it "is an integral part of Ohio's criminal justice system," under *Evitts v. Lucey*, 469 U.S. 387 (1985). In making this argument, Mr. Woodard and his *amici* point to the historic availability of clemency in Ohio, its traditional role as a "final failsafe mechanism," its impact on the review of criminal sentences, its customary importance to the inmate and the fact that it has long been "a right conferred by the constitutional structure of the government." This approach asks the right

question; it just provides the wrong answer. While tradition no doubt informs this inquiry, it offers no refuge to Mr. Woodard. The relevant historical truth about clemency is not its availability but the discretion given the executive branch over this power and the utter lack of judicial oversight concerning its exercise. *See* Pet. Br. 2-5, 16-18, 22-25. That is why *Dumschat* accurately observed, and then relied upon the fact, that clemency decisions have "not traditionally been the business of the courts" and "are rarely, if ever, appropriate subjects for judicial review." 452 U.S. at 464.

This set of contentions also fails to come to grips with another flaw in Mr. Woodard's argument. Ohio, the 49 other States, the national government, and the political bodies that preceded them, all vested the clemency power in the executive branch for a reason: They wanted to insulate the clemency power from the other branches of government -- not to weaken the power, but to strengthen it. Once breached, however, the line separating the executive from the other branches over the exercise of clemency authority would become blurred, eventually allowing judicial review of decisions to *grant* clemency in the federal courts and if not there most assuredly in the State courts. Mr. Woodard never addresses these consequences of his argument, to say nothing of offering a solution to them.

C. Mr. Woodard and his *amici* further argue (Resp. 27-33) that such review is warranted because Ohio itself has created a protectible life or liberty interest. While conceding (Resp. Br. 29) that "the federal constitution [does] not require the states to provide clemency review in the first instance," he argues that Ohio's establishment of a clemency system meets these requirements and gives inmates "the right to meaningfully seek clemency."

This argument suffers from a number of defects. The prototypical due process problem the States face, and the one Mr. Woodard seems to be trying to implicate, stems from the States' creation of a mandatory procedure that they thereafter decline to follow. Here, to be sure, the Governor created a new clemency procedure, even one with some mandatory terms. But, importantly, he also decided to follow it. Indeed, we are here today precisely because the Governor adhered to the new (and, we respectfully believe, improved) procedure, not because he violated it or submitted to Mr. Woodard's request to alter it. A State, in short, does not customarily violate procedural due process by creating new procedures and then following them.

No less defective is Mr. Woodard's failure to acknowledge the nature of the indefinite interest that Ohio ultimately created with its new procedures. As in *Dumschat*, the clemency process at issue in no way diminishes the Governor's ultimate discretion to deny clemency applications. Under these circumstances, the Ohio procedure does not create a protectible life or liberty interest because such an interest in clemency cannot spring from what remains a "unilateral hope." *Dumschat*, 452 U.S. at 465. Put differently, it is difficult to impose an "atypical and significant hardship" on an inmate, *Sandin*, 515 U.S. 472, 115 S. Ct. at 2300, when the procedure at issue fails to diminish the Governor's ultimate discretion to deny a clemency application "for no reason at all." *Dumschat*, 452 U.S. at 467 (Brennan, J., concurring).

Nor may Mr. Woodard and his *amici* tenably counter these contentions by suggesting that *Dumschat* does not apply to capital sentences. The opinion of course contains no such limitation. And its discussion of liberty interests has equal application to life interests. "[T]he conviction, with all its procedural safeguards, has extinguished that liberty right: [Given] a valid conviction, the criminal defendant has been

constitutionally deprived of his liberty." 452 U.S. at 464 (quoting *Greenholtz*, 442 U.S. at 7). Notably, while there may be differences between life and liberty interests, they are accounted for long before a clemency application is made. The Court has required the States to set up a host of procedural safeguards precisely to ensure the legitimacy of a capital sentence. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231 (1988) (a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of the defendant compared to others found guilty of murder); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (state must establish rational criteria that narrow the decisionmaker's judgment as to whether the particular circumstances of defendant's case meet the threshold below which the penalty cannot be imposed); *Skipper v. South Carolina*, 476 U.S. 1 (1986) (jury must be allowed to consider all of a capital defendant's mitigating evidence); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (plurality opinion) (jury must understand the critical role it plays in the sentencing decision); *Zant v. Stephens*, 462 U.S. 862 (1983) (a State's sentencing procedure must suitably direct and limit the decisionmaker's discretion); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (same); *Beck v. Alabama*, 447 U.S. 625 (1980) (jury must be given the option of convicting the defendant of a lesser offense).

These protections, however, all apply at trial. They are designed to ensure the propriety of "the trial stage of capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide the questions of guilt and punishment." *Murray v. Giarratano*, 492 U.S. 1, 9 (1989) (plurality opinion). The protections, notably, do not apply to the appellate stage of the proceeding, *see Pulley v. Harris*, 465 U.S. 37 (1984), or to collateral review, *see Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion). Still less

should they apply to executive clemency decisions, which (unlike direct appeal and collateral review) remain entirely discretionary.

II. VOLUNTARY CLEMENCY INTERVIEWS DO NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON AN INMATE'S PRIVILEGE AGAINST SELF-INCRIMINATION.

A. Mr. Woodard initially responds (Resp. Br. 35-37) to Ohio's contention that his Fifth (and Fourteenth) Amendment rights were not violated by claiming there are insufficient facts to assess this argument. He suggests (Resp. Br. 36-37) that the issue "cannot be resolved without assessing the risk of incrimination" under the procedure and that "[t]he State has failed to prove that no set of facts under Ohio's Death Penalty Clemency Procedure could require that he risk self-incrimination." The record, however, *is* clear on this point. Nothing in the procedure grants clemency applicants immunity for what they might say or makes the interview in any way confidential. Ohio has permissibly chosen not to allow the inmate to say one thing in the interview and another in a habeas petition, and no amount of discovery will alter this feature of the procedure.

In claiming that Ohio must demonstrate that there are "no set of facts" under which he might risk self-incrimination, Mr. Woodard also has mischaracterized the relative burdens of the parties. While the overbreadth doctrine of the First Amendment allows free speech advocates to invalidate statutes by positing potentially unconstitutional applications of a law, *see, e.g., Perry v. Sinderman*, 408 U.S. 593 (1972), the Fifth Amendment does not. No precedent that we know of, and certainly none that Mr. Woodard has cited, allows individuals to hypothesize self-incrimination fact patterns in discovery,

compel the State to indicate how it would respond to each set of facts, then allow a court to rule on the validity of each response -- all before a single one of these possibilities has come to pass. As the Court has held in rejecting an unconstitutional conditions claim, the procedure "is not, on its face, an invalid practice, and there is no basis in the record for invalidating it as here applied to" Mr. Woodard. *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976).

Mr. Woodard also claims (Resp. Br. 41 & n.29) that the procedure fails to make clear that he may "refuse to answer questions" and thus may allow officials to "compel" answers from him. While all agree that Ohio cannot engage in this kind of coercion, whether in the clemency setting or elsewhere, this does not help Mr. Woodard. Should such egregious conduct occur in the future, Mr. Woodard may challenge the State then. But he cannot take down the entire clemency procedure on the presumption that the State will act unconstitutionally in the future. Indeed, even a procedure that said "no coercion allowed" could be breached, creating essentially the same risk that now exists with a procedure that is silent on the point. At any rate, because the law gives State and federal employees a very different presumption -- that they will obey their duty to follow the Constitution, not breach it, *see e.g., Fairbanks v. United States*, 118 U.S. 283, 285 (1901) -- this argument should be rejected.

B. In turning to the merits, Mr. Woodard seems to claim (Resp. Br. 38-39) that the Ohio procedure sets one constitutional right against another, as prohibited by *Simmons v. United States*, 390 U.S. 377 (1968). But how remains unclear. Unlike *Simmons* where the government forced the defendant to waive his Fifth Amendment right in order to establish standing to assert his Fourth Amendment right to suppress an illegal search, Mr. Woodard faces no such dilemma. Far from forcing him to choose between two

constitutional rights, Ohio has not even forced him to waive one. Only two possible rights could be infringed in this setting -- the right to counsel and the right to remain silent. Mr. Woodard nowhere appears to argue that he has a constitutional right to have counsel at the clemency interview. And he cannot establish that the procedure compels him to speak or even attend the interview -- because it does not. His participation is wholly voluntary.

Nor, contrary to Mr. Woodard's suggestion (Resp. Br. 39), must he "participate in the clemency interview" in order "to be heard." The procedure allows written submissions (with State-paid counsel available for guidance), which give him an initial voice in the decisionmaking process. *See* Ohio Death Penalty Clemency Procedure, VI(E)(1) (J.A. 12). He next suggests (Resp. Br. 39) that the State may use his silence, that is a decision not to be interviewed, against him in the clemency determination. This again poses an alleged problem that has not yet occurred and may never occur. It also remains unclear how to gauge the legal consequences of such an adverse inference. Since Ohio Governors ultimately remain free to grant or deny clemency with no regard to the amount of evidence arrayed for or against an applicant, they would seem to be entitled to draw whatever inference they wish from all aspects of the clemency application (for example, what is said or left unsaid in a written statement or the application itself), not just the interview. At all events, the Court has held that adverse inferences may be drawn from an individual's silence in a similar setting. For instance, in *Baxter v. Palmigiano*, the Court held that "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary hearing is not, on its face, an invalid practice." 425 U.S. at 320.

C. Equally unavailing is Mr. Woodard's attempt (Resp. Br. 39-46) to distinguish the cases on which the State has relied. In the criminal procedure context, as we have shown

(Pet. Br. 27-29), government may offer benefits on the condition that the recipient waive certain criminal procedure rights, and it may restrict individuals from insisting on speaking freely in one setting while demanding silence in another. Many of these cases, moreover, pose far more difficult choices for the individual than the one Mr. Woodard faces. Consider *McGautha v. California*, 402 U.S. 183 (1971), which upheld a State procedure that said a criminal defendant could exercise the right against self-incrimination on the issue of guilt only on the condition that he also surrender the right to testify on the issue of punishment; or *Wyman v. James*, 400 U.S. 309 (1971), which allowed the government to condition the receipt of welfare benefits on the recipient's submission to warrantless searches. Except to make the unexceptional point that the facts in these cases differ from those here, Mr. Woodard offers no meaningful explanation why these time-tested principles do not apply with equal force to the Ohio clemency procedure. Nor do the cases cited by Mr. Woodard advance his claims. They are all inapposite. *See Estelle v. Smith*, 451 U.S. 454 (1981) (finding that statements to a court-ordered psychiatrist could only be used at trial where the State advised defendant of *Miranda* rights and defendant freely waived them); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (discussing when interrogation occurs); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (finding privilege against self-incrimination is available to witnesses called in front of a grand jury); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (finding privilege against self-incrimination applies to civil proceedings); *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (finding that a grand jury witness is not required to incriminate himself).

D. Perhaps most troubling of all, Mr. Woodard's argument attempts to take the concept of unconstitutional conditions in a direction it has never gone before. As the name suggests, the theory has always required a waiver of at least one constitutional right in return for some government benefit. But

here, as suggested above, Mr. Woodard has not even been able to show a single right that has been infringed. He has no constitutional right to counsel at clemency (even though Ohio has chosen to overprotect him by providing appointed counsel). He has no right to a clemency interview (even though Ohio has chosen to give him one). And he has no obligation to speak at, or even participate in, the interview. All Ohio has done is extend rights on a limited basis. It thus has not required a waiver of constitutional rights, but at most a waiver of extra-constitutional benefits.

Of course, if this novel theory is to take root, it ought to get equal play when it comes to other constitutional guarantees. Not just property rights would be covered by this expansive concept, *see Dolan v. City of Tigard*, 512 U.S. 374 (1994), so too would the structural guarantees of the Constitution. Whether it be the Tenth and Eleventh Amendments, or the foundational protections of liberty established by a system of "dual sovereignty" in which the federal government has just limited powers, *Printz v. United States*, __ U.S. __, 117 S.Ct. 2365 (1997), each of these guarantees would be eligible for unconstitutional-condition treatment. No plausible explanation exists for making Mr. Woodard's theory, or those theories promoted by renowned scholars, *see, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989), applicable to some, but not all, constitutional rights. Such views would potentially transform many of the Court's federalism decisions. They might, for example, undermine the result in cases like *South Dakota v. Dole*, 483 U.S. 203 (1987), which permitted the federal government to condition the States' receipt of federal highway funds on the waiver of their right to establish drinking ages below 21. *See also Oklahoma v. Civil Service Comm'n.*, 330 U.S. 127 (1947) (finding that the federal government could condition the States' receipt of federal highway funds on the waiver of the rights of members of the State Highway Commission to be engaged in

political activity).

In the final analysis, Mr. Woodard's theory of unconstitutional conditions is unprecedented, wrong and full of unanticipated consequences. Ohio has not breached any guarantee of the United States Constitution by adopting its clemency procedure, and no theory of unconstitutional conditions can -- or should -- change that fact. Perhaps recognizing the difficulties of Mr. Woodard's argument, not one of the three *amicus* briefs supporting him has offered a single argument on this score. His contention should be rejected as a matter of law.

CONCLUSION

For the foregoing reasons as well as those expressed in our opening brief, we respectfully urge the Court to reverse the judgment of the court of appeals.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

WILLIAM A. KLATT
First Assistant Attorney General
Counsel of Record
JEFFREY S. SUTTON
State Solicitor
SIMON B. KARAS
Deputy Chief Counsel
JON C. WALDEN
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

Counsel for Petitioners

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

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v.

EUGENE WOODARD, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON AND WYOMING IN SUPPORT OF PETITIONER

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General
WARD A. CAMPBELL *
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
* Counsel for Amici Curiae

[Additional Counsel Listed on Inside Page]

BILL PRYOR
Attorney General
State of Alabama

GRANT WOODS
Attorney General
State of Arizona

WINSTON BRYANT
Attorney General
State of Arkansas

GALE A. NORTON
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

THURBERT E. BAKER
Attorney General
State of Georgia

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

JEFFREY A. MODISETT
Attorney General
State of Indiana

ALBERT B. CHANDLER, III
Attorney General
Commonwealth of
Kentucky

RICHARD P. IEYOUB
Attorney General
State of Louisiana

ANDREW KETTERER
Attorney General
State of Maine

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

MIKE MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PETER VERNIERO
Attorney General
State of New Jersey

DENNIS C. VACCO
Attorney General
State of New York

MICHAEL F. EASLEY
Attorney General
State of North Carolina

D. MICHAEL FISHER
Attorney General
Commonwealth of
Pennsylvania

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

DAN MORALES
Attorney General
State of Texas

JAN GRAHAM
Attorney General
State of Utah

RICHARD CULLEN
Attorney General
Commonwealth of Virginia

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

WILLIAM U. HILL
Attorney General
State of Wyoming

(CAPITAL CASE)

QUESTIONS PRESENTED

1. WHETHER STATE CLEMENCY PROCEDURES MAY BE REVIEWED UNDER THE DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT ESTABLISHED BY *EVITTS V. LUCEY*, 469 U.S. 387 (1985), OR WHETHER *CONNECTICUT BOARD OF PARDONS V. DUMSCHAT*, 452 U.S. 458 (1981) CONTAINS THE SOLE DUE PROCESS LIMITATIONS ON THESE PURELY EXECUTIVE PROCEDURES.

2. WHETHER INMATE INTERVIEWS, HELD VOLUNTARILY AT THE REQUEST OF THE INMATE AS PART OF A STATE CLEMENCY PROCEDURE, IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997
No. 96-1769

OHIO ADULT PAROLE AUTHORITY, et al., *Petitioner*,

v.

EUGENE WOODARD, *Respondent*.

INTEREST OF AMICI CURIAE STATES

Amici curiae are the legal representatives of their states' executives and of the People in their states' post conviction litigation. All states have established a non-judicial clemency power in their executive branches. The opinion in *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997) [hereinafter *Woodard*] threatens to destabilize the jurisprudence underlying the states' criminal justice schemes, including the clemency power.

Amici have relied upon this Court's assurance that the executive clemency power is not an appropriate subject for judicial review. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 460 (1981) [hereinafter *Dumschat*]. This Court also advised the states that once their capital punishment statutes met Eighth Amendment requirements that the states enjoy "their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). Amici vested unfettered clemency discretion in their executives on the assumption that executive decisions

would be final and not subject to additional judicial review. *Woodard's* historically unsupported holding that an undefined, barely perceptible due process protection applies to clemency opens the door to intrusive judicial scrutiny of every states' clemency decisions.

Amici states have taken the cue from the Constitution by vesting the clemency power in their executive as an alternative to the procedural rigidity of the judicial branch. The clemency process allows for a non-judicial review of individual cases. The prospect of an additional level of intrusive litigation and discovery relating to the clemency process itself will inevitably inhibit the flexibility of this power, dilute the sense of personal responsibility in the executive necessary to the meaningful consideration of clemency cases, and affect clemency's availability.[1]

SUMMARY OF ARGUMENT

Our nation's history, traditions, and practices do not establish that a claimant for state executive clemency is entitled to any protections under the Due Process Clause of the Fourteenth Amendment. From "time immemorial" the clemency power has been vested exclusively within the executive. It is an unfettered,

1. This Court's wisdom in granting review has been vindicated by recent Sixth, Eighth and Ninth Circuit decisions in *In re Sapp*, __ F.3d __, 1997 W.L. 357822 (6th Cir. 1997), *Perry v. Brownlee*, ___ F.3d ___ 1997 W.L. 451160 (8th Cir. 1997) and *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997). In these cases, capital claimants mounted last-minute attacks on the states' clemency procedures. These maneuvers confirm amici's concern that *Woodard* would lead to burdensome discovery requests, increased litigation and potential delay in post conviction proceedings. The concerns are heightened, of course, in capital cases. *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2070 (1997) (Rehnquist, C.J. dis.).

discretionary power that acts independently of the criminal adjudication system.

The states' executive clemency power is substantially modelled on the Pardoning Power in the United States Constitution and the historic royal prerogative in England. These sources established that an exclusive, flexible clemency power should be vested in the executive branch as a counterpoint to the procedural rigidity inherent in the judicial branch.

Judicial review of state executive clemency processes adds an unnecessary layer of litigation to the already protracted process of reviewing criminal convictions. It involves the federal judicial branch in the troubling and serious business of reviewing the variable procedures of totally separate sovereignties, the state executive branches. Such review is paradoxical since clemency is meant as a check on the judicial branch itself. Since the clemency power is vested in the absolute discretion of the executive, judicial review is contrary to this Court's decision in *Dumschat*. Because the clemency power is not a "constituent part of the justice system" it is not subject to judicial review under *Evitts v. Lucey*, 469 U.S. 387 (1985).

The Constitution does not entitle clemency claimants to control the circumstances under which their claims shall be heard. The unfettered discretion reposed in the state executive permits the executive to consider a claimants' declination of the opportunity to be interviewed by clemency authorities as a factor in reaching the clemency decision. The inherent power to give mercy as an official act in the interest of the public welfare also permits a negative inference to be drawn from a claimants' refusal to waive the Fifth Amendment privilege against self-incrimination. Clemency applicants are not entitled to immunities available to defendants facing trial. Even if the privilege against self incrimination applied, the

executive is not forbidden from considering its invocation as a reason to deny clemency.

ARGUMENT

I.
THE STATE EXECUTIVE CLEMENCY POWER IS NOT SUBJECT TO JUDICIAL REVIEW UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

This Court is considering whether a federal court may review the state executive clemency process under the Due Process Clause. This important question arrives at the intersection of our double-deckered Constitutional system of "dual sovereignty"; a multi-level system which divides power between federal and state governments and then subdivides the power between branches of those governments. *Printz v. United States*, __ U.S. __, 117 S. Ct. 2365, 2376 (1997).

This issue raises troubling concerns about the always sensitive area of judicial review of executive decisions. *Herrera v. Collins*, 506 U.S. 390, 421 (O'Connor, J. conc.); *cf. Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987). This Court has cautioned that the open-ended expansion of the Due Process Clause "invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1992). Substantial deference is owed both to the states' expertise in matters of criminal procedure and to the centuries of common law tradition. *Id.*, at 445. The utmost care must be exercised in expanding the reach of the Due Process Clause, "lest [the Due Process Clause]

be transformed into the policy preferences" of the courts. *Washington v. Glucksberg*, __ U.S. __, 117 S. Ct. 2258, 2262 (1997).

It is especially imperative that this Court begin, as it always does in due process cases, with examining our history, traditions, and practices. *Washington*, 117 S. Ct. at 2262. A due process violation is established only when the state transgresses some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Herrera v. Collins*, 506 U.S. 390, 407-408 (1993). Given the well-settled traditions and practices of the clemency power, the burden of demonstrating a due process interest is especially heavy. *Schick v. Reed*, 419 U.S. 262, 266 (1974); *Ex parte Grossman*, 267 U.S. 87, 118-119 (1925).

Historical exposition is particularly appropriate in the context of state executive clemency. Both the President's power of clemency and the state executives' powers are traceable to the same roots. *Ex parte Wells*, 18 How. (59 U.S.) 307, 313 (1855); *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1229 fn. 27 (D.C.Cir. 1974).[2]

Historical analysis supports this Court's conclusion in *Dumschat* that due process protections do not apply to executive clemency. The due process protections for first appeals represented by *Evitts* are not relevant since clemency is not a "constituent part" of the adjudication process and because the clemency power was entrusted to the province of the inherently meaningful and scrupulous consideration of the executive. Given the history and nature of the clemency power, judicial review

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2. Amici note, however, that the "powers held by the federal executive are not dispositive of the scope of authority inhering in a state governor...." *Carchedi v. Rhodes*, 560 F. Supp. 1010, 1014 (S.D.Oh. 1982). Hamilton actually argued that the New York governor had greater clemency powers than the President. Hamilton, Federalist No. 69 (Rossiter ed. 1961) at pp. 418-419.

under the Due Process Clause is both undesirable and paradoxical.

In *United States v. Wilson*, 7 Pet. (32 U.S.) 150, 160-161 (1833) Chief Justice Marshall explained:

> "As [the Pardon Power] has been exercised from time immemorial by the executive of that nation whose language is our language; and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

Since *Wilson*, this Court has reiterated that the meaning of the Pardon Power must be interpreted in reference to British law and institutions as they existed at the time the Constitution was drafted. *Grossman*, 267 U.S. at 108-109 (1925); *Wells*, 18 How (59 U.S.) at 310-311 (1856); *Solesbee v. Balckom*, 339 U.S.9, 12 (1950); *Schick*, 419 U.S. at 262; *Herrera*, 506 U.S. at 412.

A. The Royal Prerogative

"Historically, the power of pardon has been near to an absolute, if not absolute power of the executive, and thus vested with certain flexibility." Grupp, *Historical Aspects of the Pardon in England*, 7 Am. J. Leg. Hist. 51 (1963).

Both the power of clemency and any due process components are viewed through an historic lens that peers as far back as pre-Hastings Saxon England during which kings exercised a private, primitive "household power" of withholding or inflicting vengeance or retribution. Note, 39 N.Y.U.L. Rev. 137, 139 & fn. 10 (1964). After the Conquest of England, the Normans endeavored to

maintain that the clemency power was the "exclusive prerogative of the sovereign." However, a succession of English kings struggled with the nobility and the Church for possession of the pardon power. Parliament legislated restrictions on that power until Henry VIII secured a statute vesting the king with "the whole and sole power and authority" to pardon in 1535. *Id.* at 140 & fn. 14.

During the early 1700's, the pardon power was the special prerogative of the Crown subject to limited Parliamentary restrictions. 39 N.Y.U.L. Rev. at 140; *Grupp*, at 56-58. As this Court noted in *Herrera*, Blackstone praised the power of the sovereign "to extend mercy, whenever he thinks it is deserved; holding a court of equity in his own breast, to soften the rigueur of the general law, in such criminal cases as merit an exemption from punishment." *Herrera*, 506 U.S. at 412 quoting 4 W. Blackstone, Commentaries 397.[3] Lord Edward Coke described the royal pardon as a "work of mercy.... It is frequently conditional, as he may extend his mercy upon what terms he pleases...." *Wells*, 59 U.S. at 311.

The clemency power in Colonial America was also vested initially and exclusively in the various colonies' chief executives with some restrictions. Prior to the Constitutional Convention, the states diluted the power of

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3. The absolute power of the sovereign was recognized in theatrical and literary comment. Portia's famous soliloquy about the "quality of mercy" included the pronouncement that mercy "is enthroned in the hearts of kings, It is an attribute to God Himself." Shakespeare, *Merchant of Venice*, Act IV (1597). Similarly, the lawyer and melodramist, Pietro Metastasio, wrote, "Mercy belongs to Gods and Kings alone." Metastasio, *La Clemenza di Tito, III* (1735). Francis Bacon wrote, "[I]t is a prince's part to pardon." Francis Bacon: *Essays, IV* (1597). Whichcote generalized, "In all supremacy of power there is inherent a prerogative to pardon." Benjamin Whichcote: *Moral and Religious Aphorisms* (1753). Perhaps the best description of the distinction between judicial and executive powers is Dryden's, "Reason to rule, but mercy to forgive. The first is law, the last prerogative." John Dryden, *The Hind and the Panther* 1.261 (1687).

their governors by spreading the power into the legislature. 39 N.Y.U.L. Rev. at 141; *Herrera*, 506 U.S. at 414.

B. Constitutional Clemency

Nonetheless, when the Constitutional Convention convened in 1787, the delegates viewed the pardon power as being within the domain of the executive with some legislative, not judicial, restrictions. *Schick*, 419 U.S. at 262. It was agreed at that time that the English king "may extend his mercy on what terms he pleases...." *Id.*, at 261 quoting 2 W. Hawkins, *Pleas of the Crown* 557 (6th ed. 1787). "It was implicitly understood that unless specifically limited [by Parliament], the King's power was plenary and without restriction." *Hoffa*, 378 F. Supp. at 1227, 1230. The pardoning power "at base [was] inherently unfettered except by the integrity of the repository of the power." *Id.* at 1229; see also *Schick*, 419 U.S. at 262. ("[B]y 1787 the English prerogative to pardon was unfettered except for a few specifically enumerated limitations.")[4]

The Federalist papers are a source this Court usually regards as indicative of the original understanding of the Constitution. *Printz*, 117 S. Ct. at 2372. Hamilton's Federalist No. 74, in particular, has been cited for its explanation of the scope of the Pardoning Power. *Schick*, 419 U.S. at 266 fn. 6; *Herrera*, 506 U.S. at 413-414.

Hamilton's essay expresses the two key attributes of the pardoning power envisioned by the framers: exclusivity and flexibility. The drafters believed that vesting the pardoning power solely in the executive

4. The Framers understood clemency as a "prerogative". *Schick*, 419 U.S. at 263. A "prerogative" was a right or capacity enjoyed by the king alone, a discretionary power uncontrolled by any other. *Aetna Cas. & Surety Co. v. Bramwell*, 12 F.2d 307, 309 (D.Ore. 1926) citing *Blackstone's Commentaries*, vol. 1, p. 239 (Ed. 1766).

offered the best assurance that this heavy responsibility would be exercised in a conscientious and meaningful manner. Hamilton noted that there was no disagreement as to the "expediency of vesting the power of pardoning in the President" except insofar as it related to treason. Federalist No. 74, at 448. However, given the diverse contingencies confronting the executive, Hamilton explained that it was necessary for the executive alone to have maximum unfettered discretion in exercising that power.[5]

Hamilton expounded as follows:

> "As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat* would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other to an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these

5. The adoption of the Due Process Clause of the Fifth Amendment in the Bill of Rights would not alter that analysis. The first eight amendments of the Bill of Rights were designed to incorporate the certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country. *Brown v. Walker*, 161 U.S. 591, 600 (1896). The English clemency power was one of those certain principles of natural justice.

> accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men.... It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment than any numerous body whatever." Federalist No. 74 at 447-448.[6]

The Federalist also explained the value of discretion in the exercise of clemency:

> "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.... But the principal reason for reposing the power of the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffer to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity.

6. Experience confirms Hamilton's opinion on exclusivity. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. Rich. L. Rev. 201, 221 (1993) ("I believe that traditionally capital clemency requests have been given meaningful consideration by decisionmakers."); M. Disalle, *The Power of Life or Death* 175-176 (1965) ("I have never known a governor so blase or so heartlessly devoted to the rule of eye for an eye that he did not go into a long executive session with his conscience when faced with a decision involving clemency.") Brown, *The Quality of Mercy*, 40 U.C.L.A. L. Rev. 327, 328 (1992).

> The loss of a week, a day, an hour may sometimes be fatal." Federalist No. 74 at 448

Significantly, Hamilton and other supporters of the broad pardoning power emphasized that the purpose of the pardon was not just to remedy unreliable verdicts. In their view, the power was necessary to mitigate harsh sentences, reward rehabilitation, restore tranquility, preserve the government against insurrection, or immunize accomplices who testified against their fellow offenders. These purposes required flexibility so that the clemency power could be effectively utilized without being delayed or encumbered by proceduralism. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L.R. 569, 591-592 (1991). Even today, these reasons for clemency retain their vitality. 42 Fed. Reg. 4391, 3 CFR 1977 Compl. at 4 (post-Vietnam amnesty for violators of Selective Service Law); *Murphy v. Ford*, 390 F. Supp. 1372, 1375 (W.D. Mich. 1975) (pardon of former President Nixon in interest of national tranquility).

Ultimately, the President was vested with the "power to grant Reprieves and Pardons of Offenses against the United States, except in Cases of Impeachment." U.S. Const., Art. II, sec. 2, cl. 1.[7] The power was vested completely in the President and the scope of the power was intended to be identical with that of the English Crown. *Grossman*, 267 U.S. at 113. The Framers rejected the portion of the English pardon power that resided in Parliament. *Schick*, 419 U.S. at 263; *Hoffa*, 378 F. Supp. at 1231. This Court characterized the pardon power as "unlimited" and independent of the other branches. *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1866); *United States v. Klein*, 13 Wall. (80 U.S.) 128, 147

7. The "impeachment" prohibition tracked a similar restriction on the English monarch. *Schick*, 419 U.S. at 262.

(1871). The President was not required to seek or to rely upon any advice. *Hoffa*, 378 F. Supp. at 1244. The power to pardon flowed from the Constitution alone and "its limitations, if any, must be found in the Constitution itself." *Schick*, 419 U.S. at 267 (emphasis added).[8]

C. Separation of Powers

The clemency power had its origins as "something above and beyond the normal workings and restrictions and limitations of the criminal justice system...." *Hoffa*, 378 F. Supp. at 1229. The Federalist specifically distinguished the pardoning power from the judicial power:

> "The criminal code of every country partakes so much of necessary severity that without any easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Federalist No. 74, at 447.

In *Wilson*, Chief Justice Marshall illustrated the difference between the executive power and the judicial power:

> "A pardon is an act of grace.... It is the private, though official act of the executive magistrate.... It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, what may be its character, whether a pardon or release, is totally unknown and cannot be acted on."[9] *Wilson*, 32 U.S. at 160-161. See also *Herrera*, 506 U.S. at 413.

Since *Wilson*, pardon and commutation decisions have not traditionally been the business of courts; "as such they are rarely, if ever, appropriate subjects of judicial review." *Dumschat*, 452 U.S. at 464; *Solesbee*, 339 U.S. at 12; *Rosenberg v. United States*, 346 U.S. 322 (1953) (Frankfurter, J. conc.); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 421 (2nd Cir. 1950) (L.Hand, J.); *United States v. Soeder*, 120 F. Supp. 594, 595-596 (N.D. Ill. 1954).

Grossman illustrates the full extent and reach of the clemency power. The President commuted the jail sentence of a contemnor. This Court rejected the argument that the commutation violated the separation of powers. Chief Justice Taft's majority opinion rejected this argument and held the President's power absolute, even to pardon defendants found to be in contempt of the judicial branch.

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.

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8. Besides the limitations inherent within the historic definition of a pardon and reprieve, (*Biddle v. Perovich*, 274 U.S. 480, 487 (1927)) these limitations included that the pardon power only extend to federal crimes and not to cases of impeachment.

9. Commentators frequently misconstrue this passage and take it out of context to assert that Marshall described the Pardon Power as a "constituent part of the judicial system." Kobil, 69 Tex. L.R. at 611; Klassmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U.L. Rev. 1507, 1515 (1995); Note, 90 Yale L.J. 889, 896 & fn. 30 (1981); Note, 70 Chi.-Kent L. Rev. 1391, 1407 (1995); Note, 73 Neb. L. Rev. 483, 486 (1994). Marshall was stating just the opposite. He explained that a pardon is an act of the executive that occurs totally outside the judicial branch. The judiciary is not even aware of the pardon unless it is officially brought to the court's attention in court. *Woodard's* use of *Evitts v. Lucey* to describe clemency as an "integral part" of the adjudication process is completely contradicted by *Wilson*.

> The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.... [W]hoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the [President] in confidence that he will not abuse it." *Grossman*, 267 U.S. at 120-122.

Grossman teaches that the executive clemency power is more than just a corrective for the harsh and cruel results of the adjudication process. It is also a check on the abuses of the judicial branch itself. It would be a "curious logic" that imposed a level of judicial review on a system that was itself designed as a check on the judiciary. *Schick*, 419 U.S. at 267.

Woodard's claim of due process protections in the clemency process must be viewed against an historic backdrop. Unlike the appeal of right at issue in *Evitts v. Lucey*, 469 U.S. 387 (1985), executive clemency is not a "constituent part of the judicial system." Furthermore, under our constitutional system, the vesting of that power in the executive in and of itself ensures meaningful and conscientious consideration of all cases. As *Grossman* indicates, the States reposed this power in the executive with the presumption that the power will not be abused. The intrusion of judicial review would hamper the flexibility in discretion which the Framers intended.

D. Contemporary Clemency

Clemency remains an ad hoc power which may be exercised at any time for any reason. From the standpoint of the claimant, it is a possibility, not an entitlement or expectation. *Solem v. Helm*, 463 U.S. 277, 301, 303 (1983). Under any due process analysis, it does not create an entitlement or expectation. *Dumschat*, 452 U.S. at 467; *Sandin v. Conner*, __ U.S. __, 115 S.Ct. 2293, 2299 (1995). The executive has a "plenary" authority. *Schick*, 419 U.S. at 266.

This Court rejected any due process claims arising from the Fourteenth Amendment when it held in Dumschat that "[t]he ground for a constitutional claim, **if any**, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465 (emphasis added). As this Court noted in *Dumschat* and in the line of cases leading to *Sandin*, the absolute discretion imposed in the decisionmaker negates any constitutional claims under the Due Process Clause. *Sandin*, 115 S. Ct. at 2299.

Although the Constitution did not require the States to offer clemency, the States have provided for this extrajudicial remedy along the lines of the constitutional model. *Herrera*, 506 U.S. at 414. Virtually all of the States have vested their executives with either the exclusive or pivotal role in the clemency process.[10/]

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10. Virtually all states have chosen to vest the governor with the sole or decisive power of clemency. The States have also given the governor unfettered discretion, although many states do restrict the governor's clemency power in cases of treason or impeachment. Alabama (Ala. Const., art. V, § 124); Alaska (Alk. Const., art. III, § 21); Arizona (Ariz. Const., art. V, § 5); Arkansas (Ark. Const. 6, § 18); California (Cal. Const., art. V, § 8); Colorado (Colo. Const., art. IV, § 7); Delaware (Del. Const., art. VII, § 1); Florida (Fla. Const., art. IV, § 8); Hawaii (Haw. Const., art. V, § 5); Illinois (Ill. Const. art. V, § 12); Indiana (Ind. Const. art. 5, § 17); Iowa (Io. Const., art. IV, § 16); Kansas (Kan. Gen. Stat. § 22-3701); Kentucky (Ky. Const., § 77); Louisiana (La. Const. art., IV, §

Given the traditionally discretionary nature of the clemency power, the States have not been compelled to choose any particular procedural mechanisms. As a result, there is great variety in procedures among the States. 39 N.Y.U.L. Rev. at 141; National Governor's Ass'n, Guide to Executive Clemency Among the American States (1988); Nat'l Center for State Courts Clemency: Legal Authority, Procedure, and Structure (1977). Furthermore, procedures change as gubernatorial administrations change. 39 N.Y.U.L., at 146; 40 U.C.L.A.L Rev. at 337.

Since the clemency power does not "see[] only with judicial eyes" and is not a "constituent part of the justice system," it has operated along the classic design articulated by Justice Cardozo in *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. App. 1919):

> "Such an application [for clemency] is not a proceeding in court, nor one before an officer

5); Maine (Me. Const., art. V, § 11); Maryland (Md. Const., art. II, § 41, § 4-513); Massachusetts (Mass. Const., Pt. 2nd, Ch. II, § I, art. VIII); Michigan (Mich. Const., art. V, § 14); Minnesota (Minn. Stats., ch. 638, § 638.01); Mississippi (Miss. Const., art. 5, § 124) Missouri (Mo. Const., art. IV, § 7); Montana (Mont. Const., art. VI, § 12); New Hampshire (N.H. Const., Pt. 2nd, art. 52); New Jersey (N.J. Const., art. V, §II:1); New Mexico (N.M. Const., art. V, § 6); New York (N.Y. Const., art. IV, § 4); North Carolina (N.C. Const., art. 3, § 5); North Dakota (N.D. Const., art. V, § 7); Ohio (Oh. Const., art. III, § 11); Oklahoma (Okla. Const., art. VI, § 10); Oregon (Ore. Const., art. V, § 14); Pennsylvania (Pa. Const., art. IV, § 9); Rhode Island (R.I. Const. , art. IX, § 13); South Carolina (S.C. Gen. Stats., § 24-21-910); South Dakota (S.D. Const., art. IV, § 3); Tennessee (Tenn. Code, tit. 40, ch. 27, § 40-27-101); Texas (Tex. Const., art. IV, § 11); Vermont (Vt. Const., Ch. II, § 20); Virginia (Va. Const., art. V, § 12); Washington (Wash. Const., art. III, § 11); West Virginia (W.V. Const., art. VII, § 11); Wisconsin (Wis. Const., art. V, § 6); Wyoming (Wyo. Const., art. 4, § 5).

Other states have vested the clemency powers in executive boards in which the governor's action is not decisive. Connecticut (Conn. Gen. Stat. § 18-26); Georgia (Geo. Const. art.IV, § II); Idaho (Id. Const. art. IV, § 7); Nebraska (Neb. Const. art. IV, § 13); South Carolina (S.C. Gen. Stat. § 24-21-920) (non-capital cases); Utah (Ut. Const. art. VII, § 12).

> having "attributes similar" to a court's. [Citation omitted.] It is a petition for mere grace and mercy.... It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there are arguments of counsel... At such a time anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion be stirred."

In addition, due to the sensitive nature of the investigations, discovery in clemency proceedings is limited. It is not customary for the claimant to be present for a clemency session. There are usually no prescribed rules of procedure and rules of evidence are not usually applicable. There is no requirement for any statement of reasons for a clemency decision. *Dumschat*, 452 U.S. at 466; *Otey v. Stenberg*, 34 F.3d 635, 637 (8th Cir. 1994); 39 N.Y.U.L. Rev. at 152-158.

There is no more reason today to hold that the Due Process Clause compels judicial review of the state clemency power than there was in 1787. Historically the clemency power was conceived as part of a system that did not require state appellate or collateral review, much less the current federal habeas corpus review. *See, e.g.*, *Wright v. West*, 505 U.S. 277, 285-295 (Thomas, J., plur.), 297-303 (O'Connor, J. conc.) (tracing historical development of federal review); *McKane v. Dunston*, 153 U.S. 684 (1894); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).[11] For that matter, due process standards did not

11. Until *Woodard*, both federal and state courts have had the restraint repeatedly to hold that clemency decisions are not judicial functions and that the executive has unlimited discretion. It is exclusively executive and not

apply to the death penalty. *McGautha v. California*, 402 U.S. 183 (1971). The executive cannot be expected to provide greater due process protection than required of the judicial branch.

If anything, the development of parole and the increased judicial scrutiny of criminal convictions by the state and federal courts militates against procedural restrictions on the clemency power. As this Court noted when it essentially restored the death penalty in *Gregg v.*

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reviewable by the judiciary, even under the Due Process Clause. *United States v. Patti*, 291 F.2d 745, 746 (3rd Cir. 1961); *Spinkellink v. Wainwright*, 578 F.2d 582, (5th Cir. 1978); *Wainwright v. Brownlee*, 103 F.3d 708, 709 (8th Cir. 1997); *Peck v. Battey*, 721 F.2d 1157, 1159 (8th Cir. 1983); *Binion v. United States Department of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983); *Green v. Teets*, 244 F.2d 401, 403 (9th Cir. 1957); *Hatch v. State of Oklahoma*, 92 F.3d 1072, 1076 (10th Cir. 1996); *Bundy v. Dugger*, 850 F.2d 1402, 1423-1424 (11th Cir. 1988); *Banks v. Arizona State Board of Pardons & Paroles*, 629 P.2d 1035, 1037-1038 (Ariz. App. 1981); *Arnold v. Board of Pardons & Paroles*, 805 P.2d 388, 391 (Ariz. App. 1990); *Jenkins v. Knight*, 293 P.2d 6, (Cal. 1956); *People v. Herrera*, 516 P.2d 626, 629 and cases cited therein (Colo. 1973); *People v. Bradney*, 652 N.E.2d 428, 431 (Ill. App. 1995); *People ex rel. Symonds v. Gualano*, 260 N.E.2d 284, 290 (Ill. App. 1970); *Colvin v. Bowen*, 399 N.E.2d 835, 838-840 (Ind. App. 1980); *State v. Jones*, 639 S.2d 1144, 1150 (La. 1994); *Whittington v. Stevens*, 73 S.2d 137, 139-140 (Miss. 1954); *State v. Hunter*, 477 A.2d 797, 802-803 (Me. 1982); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970); *State v. Robinson*, 356 A.2d 449, 455 (N.J. 1976); *Holder v. State*, 488 P.2d 600, 602 (Okla. App. 1971); *Eacret v. Holmes*, 333 P.2d 741, 744 (Ore. 1958) and cases cited therein; *Hennessey v. Pennsylvania Board of Pardons*, 655 A.2d 218, 220 & fn.2 (Pa. 1995); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994); *State v. Oban*, 372 N.W. 2d 125, 128 (S.D. 1985); *Collins v. State*, 550 S.W.2d 643, 650 (Tenn. 1977); *R.R.E. v. Glenn*, 884 S.W.2d 189, 192 (Tex.App. 1994); *Doe v. Salmon*, 378 A.2d 512, 514-515 (Vt. 1977); *Kennedy v. State*, 595 P.2d 577, 578 (Wyo. 1979); *see also*, *Mallory v. State*, 435 P.2d 254, 255 (Id. 1967).

The pre-*Dumschat* case of *McGee v. Arizona State Board of Pardons and Paroles*, 376 P.2d 779 (1962) is oft-cited as the lone case which did find due process protections in the state clemency process. However, *McGee's* "reasoning" is "strained." 39 N.Y.U.L. Rev. at 179. Subsequent Arizona court decisions hold that *McGee* is not based on any federal constitutional rationale. *Banks*, 629 P.2d at 1038.

Georgia, 428 U.S. 153, 199-200, fn. 50 (1976), restrictions on the clemency process would be alien to our sense of criminal justice. In *Herrera*, this Court noted that the clemency power as it is presently functioning had resulted in the pardon of wrongly-convicted defendants. *Herrera*, 506 U.S. at 415.

Moreover, this Court has held that due process protections do not apply to the discretionary and collateral levels of judicial review which now ordinarily intervene between the trial and clemency process. *See, e.g., Coleman*, 501 U.S. at 752; *Ross v. Moffitt*, 417 U.S. 600 (1974). This Court has never accepted the premise that when a State "chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). As a result, federal courts decline to review such state processes. *See, e.g., Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989). Executive power should be treated no differently.

Judicial review is not a positive prospect for the clemency process. This Court has noted the problems with micromanagement of the states correctional system. *Sandin*, 115 S. Ct. at 2299-2300. Litigation such as the civil rights suit in this case will potentially hinder the information and deliberative process. *See, e.g., Binion*, 695 F.2d at 1191. Given the variety of procedures, the court will surely embark on the kind of case-by-case, state-by-state scrutiny of clemency procedures that the judicial system abhors. *Sandin*, S. Ct. at 2299-2300.

To agree with *Woodard*, this Court would "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Washington*, 117 S. Ct. at 2269. Although *Woodard* purports to minimize the potential due process protections, it cannot escape Justice Cardozo's warning that every principle has a tendency to expand itself to the limits of its logic. Without complete rejection of *Woodard*,

the states will descend a slippery slope of expanded litigation into this area. *Id.*, at 2274 & fn. 23.

Indeed, the slippage has already begun. Since the granting of certiorari in this case, the Sixth, Eighth, and Ninth Circuits have considered last-minute challenges to state clemency procedures in capital cases. In *Woratzeck*, the Ninth Circuit relied on *Woodard* to hold that clemency procedures violate due process if the procedures "shock the conscience." *Woratzeck*, 117 F.3d at 404. In the decision of *In re Sapp*, the Sixth Circuit overturned a stay of execution in a civil rights suit challenging Kentucky's totally discretionary clemency system. However, *Sapp* leaves open a challenge to any clemency system that has instituted specific clemency procedures even though those procedures do not affect the governor's unfettered discretion. No court has ever held any rights are created by the establishment of procedures to rationalize or regularize the process by which a discretionary decision is made. *See, e.g., Sandin*, 116 S. Ct. at 2299; *Dumschat*, 452 U.S. at 466-467; *Hoffa*, 378 F. Supp. at 1244. In *Perry*, the Eighth Circuit also overturned a last-minute stay of execution issued by a district court in reliance on *Woodard*.

Thus, the courts have already slid into an analysis that incorrectly "shifts the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation...." *Sandin*, 115 S. Ct. at 2299. The courts are ignoring *Dumschat's* admonition that an "underlying right must come into existence before it can trigger due process protection." *Dumschat*, 452 U.S. at 458. The court will now conduct microscopic searches for heretofore unseen and unknown, conscience shocking due process violations. This is "hardly... federalism at its best." *Otey*, 34 F.3d at 638.

A state which offers executive clemency has more than fulfilled any due process requirement.

Additional proceduralism requires subtle balancing of societal interests by the legislative branch, not the judicial. *Medina*, 505 U.S. at 453. As history shows, the clemency power has been peculiarly subject only to legislative constraints. The states have concluded that society's interests are best served by a judicial system of review and a separate unencumbered executive system of review. It is a power that requires discriminating choices and individualized judgment. *Schick*, 419 U.S. at 256, 268. "The very essence of the pardoning power is to treat each case individually." *Ibid.* Any restriction on that flexibility would inhibit the frequency of its existence. *Id.* at 267.

Amici submit that there is no fundamental principle of justice so rooted in the traditions and conscience of our people to require judicial review of executive clemency procedures under the Due Process Clause.[12]

II.
THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO VOLUNTARY INMATE INTERVIEWS FOR STATE EXECUTIVE CLEMENCY PROCEEDINGS

This Court has also granted certiorari on a question of whether clemency applicants may be required to waive the privilege against self-incrimination as part of a voluntary clemency interview. There is no support for

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12. Similarly, this Court consistently refuses to interfere in the exercise of the state reprieve power. *See, e.g., Storti v. Massachusetts*, 183 U.S. 138, 142 (1901); *Lambert v. Barrett*, 159 U.S. 660, 662-663 (1895); *Rogers v. Peck*, 199 U.S. 425, 434-435 (1905).

the position that clemency claimants are entitled to protection against self-incrimination when they voluntarily agree to a clemency interview.

This question tests this Court's repeated assurances that clemency is an ad hoc exercise of state executive power and that a governor "may commute a sentence at any time for any reason without reference to any standards." *Solem*, 463 U.S. at 301. A state executive is not required to act "on prescribed grounds." *Dumschat*, 452 U.S. at 467. In our constitutional system, the federal pardon power is an official act of grace based on the "public welfare." *Biddle*, 274 U.S. at 486.

Clemency review requires collection of information, including information from the applicant. A clemency applicant has an incentive to offer complete and truthful information in order to impress the decisionmaker. The executive has no interest, however, in allowing the clemency interview to be engulfed by an "immunity bath" for the applicant or any potential accomplices. An applicant's refusal to talk may be just as "informative" to the executive in determining clemency as an interview.

Woodard holds that it is unconstitutional to condition a clemency claimant's unilateral hope for clemency on an agreement to waive the privilege against self-incrimination for a voluntary interview by state clemency authorities. Amici submit that *Woodard* is wrong. The Constitution does not forbid a state executive from considering the applicant's refusal to waive the privilege against self-incrimination in making a clemency decision. As a matter of "public welfare", a state executive may legitimately and constitutionally decide to deny clemency for an applicant who is unwilling to waive the Fifth Amendment privilege.

The clemency process vests absolute discretion in the executive. While clemency is usually considered after when there is little or no prospect of judicial relief

and the only remedy is the discretionary mercy of the executive, the point at which the application is considered is not dispositive. It is the autonomy of the executive which separates clemency from judicial proceedings. Whenever the application is considered, it would be a "curious logic" to permit the supplicant to dictate the conditions under which the supplication will be heard. *Schick,* 419 U.S. at 267; compare *Biddle,* 274 U.S. at 480 (a claimant "on no sound principle ought to have any voice in what the law should do for the welfare of the whole.").

Silence or an unwillingness to talk without immunity is very persuasive evidence itself. *Baxter v. Palmigiano,* 425 U.S. at 319. A governor "cannot be faulted for drawing a negative inference from petitioner's noncooperation." *Roberts v. United States*, 445 U.S. 552, 562 (1980) (Brennan, J. conc.). Silence supports a rational conclusion that the claimant lacks the "laudable attitude[]" or "willingness to shape up and change his behavior...." *Id.* at 557 (maj. opn. of Powell, J.). In this context, there is nothing "insolubly ambiguous" about his silence. *Id.* at 561. It is not unconstitutional to withhold leniency from "those who have not demonstrated those attributes on which leniency is based." *Corbitt v. New Jersey,* 439 U.S. 212, 223 (1979); *McMorrow v. Little,* 109 F.3d 432, 436 (8th Cir. 1997). The absence of information from the claimant "provides no weight on the scale in favor of" clemency. *Quegan v. Massachusetts Parole Board,* 673 N.E.2d 42, 44 (Mass. 1996).

The Constitution does not prevent the executive from drawing a negative inference from a claimant's silence. A clemency process is not a criminal trial. *Baxter,* 425 U.S. at 319. It is a wide-ranging informational process in which the claimant's guilt is rarely an issue. The executive has broad discretionary power which permits the denial of clemency for any reason. Since the State has no burden, the purpose of the privilege against self-

incrimination of putting the People to their proof is not implicated. *Rogers v. Richmond,* 365 U.S. 534, 541 (1961). If anything, as *Woodard* points out, the burden is on the claimant.

Thus, the State is not obligated to immunize clemency claimants for the purpose of being interviewed. The executive may consider the claimant's refusal to give unimmunized information in disposing of the clemency request. The very act of refusal by an applicant for mercy provides significant information to the executive. Under these circumstances, a claimant who volunteers for an interview should be no different from any other defendant who chooses to testify at trial--the claimant may be questioned fully about all pertinent matters. *McGautha v. California*, 402 U.S. 183, 215 (1971) disapproved on other grounds in *Gregg,* 428 U.S. at 195.

Even if the doctrine of "unconstitutional conditions" was applicable in this arena, a claimant would still not be protected from choosing whether or not to waive the privilege. The issue of "unconstitutional conditions" relating to waiving the privilege against self-incrimination is hardly uncharted territory. Yet, *Woodard* is more notable for the cases it ignores and the available analyses it spurns as it jumps to its conclusion that the Ohio clemency interview could impose an unconstitutional condition.

The general rule is that the privilege must be claimed when self-incrimination is threatened or the privilege is waived. However, that general rule does not apply when "the assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and... compel[l]... incriminating testimony.' Case law forbids the States from imposing "substantial penalties" because a person exercises the privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984)

In contrast to *Woodard*, it is useful to compare the clemency interview with the probation interview

considered by this Court in *Minnesota v. Murphy.* In that case a probationer was subject to a condition to appear at his probation office and answer questions truthfully. The probationer argued that the condition impermissibly required him to choose between making incriminating statements and jeopardizing his probation status by remaining silent. This Court held that the mere compulsion to attend a meeting and answer questions truthfully did not constitute an impermissible penalty for the exercise of the privilege against self-incrimination absent any evidence that the probation condition required him not to claim the privilege. *Minnesota*, 465 U.S. at 439.

The clemency interview is even less compelling than the probation interview in *Minnesota v. Murphy*. The interview is completely voluntary. Although it should not matter, there is no indication in this case that the decision not to be interviewed will even affect the clemency decision. More decisively, unlike the probation situation in *Minnesota*, a clemency claimant is not faced with the possibility of losing any conditional liberty. The claimant is hoping to gain some sort of conditional liberty in the form of a pardon or commutation. Certainly if the probation condition in *Minnesota* did not constitute an unconstitutional condition, the clemency interview in *Woodard* could not be so construed.[13] This Court should not "equate the possibility of leniency with impermissible punishment." *United States v. Henry,* 883 F.2d 1010, 1011 (11th Cir. 1989).

In this case, the State is not imposing a "substantial penalty" when it simply denies clemency. "There is a crucial distinction between being deprived of

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13. *Woodard* suggests that evidence that "overwhelming majorities of the prisoners granted clemency were those who took advantage of the 'optional' interview" would establish a constitutionally cognizable benefit. *Woodard,* 107 F.3d at 1190. This Court rejected an analogous argument in *Dumschat.*

a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 9 (1979); *Dumschat,* 452 U.S. at 464. The denial of clemency only means that the claimant is being required to serve the sentence he received originally. *Quegan,* 673 N.E.2d at 44 and cases cited therein. *Woodard's* argument loses sight of the significant constitutional and "human difference between losing what one has and not getting what one wants." *Greenholtz,* at 10.

As petitioner already notes, *Woodard* also inexplicably omits mention of this Court's decision in *McGautha. McGautha* considered whether the unitary guilt-penalty trial in Ohio impermissibly conditioned the right to be heard on punishment on waiving the privilege against self-incrimination.[14] This Court explained:

> "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha*, U.S. at 213; *see also, United States v. Nobles,* 422 U.S. 225, 240 (1975); *Bonin v. Calderon,* 59 F.3d 815, 839-840 (9th Cir. 1995) and cases cited therein.

McGautha limited an "unconstitutional condition" to choices between two rights or "benefits" guaranteed under the Bill of Rights. *McGautha*, 402 U.S. at 211-212 distinguishing *Simmons v. United States*, 390 U.S. 377 (1968). However, as the Eighth Circuit recently held in *Perry v. Brownlee*--no such choice is presented in a clemency situation since there is no constitutional right to

14. The question of the unitary trial was presented in *McGautha's* companion case, *Crampton v. Ohio.*

clemency review. As *Woodard* acknowledged, the clemency process ordinarily follows judicial litigation. See also 39 N.Y.U.L. Rev. at 152. At this point, a clemency claimant has frequently been through appellate and collateral review. At trial, the privilege against self-incrimination relates to the prosecution's burden of proof. However, on appeal and in habeas corpus, it is the claimant's burden to overcome a presumptively valid judgment.

In the context of habeas corpus an adverse inference may be drawn from a petitioner's silence. *Bean v. Calderon*, 166 F.R.D. 452, 455 (E.D.Cal. 1996). Frequently, claimants have provided or will provide information by verifying petitions for writ of habeas corpus and by testifying as to formerly privileged conversations with their lawyers. *Ibid.*; *Strickland v. Washington,* 466 U.S. 691 (1984); see also Rule 6, Rules Governing Section 2254 (allowing the deposition of a petitioner in habeas corpus); *Harrison v. State,* 456 S.W.2d 371, 373 (Tex. Crim. App. 1970). Therefore, compelling an "election" between waiving the privilege and declining the clemency interview does not "impair[] to an appreciable extent any of the policies" underlying the privilege. *McGautha*, 402 U.S. at 213.

The Constitution does not necessarily forbid choices that have the effect of discouraging the exercise of constitutional rights. *Jenkins v. Anderson,* 447 U.S. 231, 236 (1980). Since claimants have no right to a particular clemency decision, they cannot challenge the states' conditions for reaching that decision. The state is not required to immunize clemency applicants when granting those claimants an opportunity to present personally their plea for executive mercy. *McGautha*, 402 U.S. at 211-212 220.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefing on file, Amici Curiae request that the Sixth Circuit Court of Appeal be reversed.

Dated: August 21, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General

WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record

Counsel for Amici Curiae

WAC:sc

(8)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, et al.,
Petitioners,

vs.

EUGENE WOODARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

42 pp

QUESTIONS PRESENTED

1) Can the federal judiciary interfere with a state's clemency process?

2) Does a prisoner have a right to immunity for any testimony given during a clemency interview?

3) Does the doctrine of unconstitutional conditions extend beyond the First Amendment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, et al.,
Petitioners,

vs.

EUGENE WOODARD,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the unprecedented intrusion of judicial review into the clemency process, and expanding the doctrine of unconstitutional conditions beyond the First Amendment. Both results hamstring important government activities and are thus contrary to the interests CJLF was formed to protect.

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

SUMMARY OF FACTS AND CASE

Respondent Woodard was sentenced to death for killing Mani Akram during a carjacking in southwestern Cleveland. *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1194 (CA6 1997) (Nelson, J., concurring in part and dissenting in part). While arguing over the division of spoils, Woodard was overheard saying "I'm the one with the murder case" and "if the nigger die, it's me that shot him, so I should get the most." *Ibid.* The Ohio Supreme Court set an execution date for October 7, 1994, but issued a stay on August 24, 1994, so that respondent could pursue state post-conviction relief. *Id.*, at 1181 (majority opinion). Since the execution was not stayed 45 days in advance, the Ohio Adult Parole Authority (APA) started the clemency process as required under Ohio's Death Penalty Clemency Procedure. On September 6, the APA informed respondent's counsel that a clemency hearing would be held on September 16. *Ibid.* Counsel was also told that if Woodard desired a pre-hearing interview with the APA, he could have it on September 9. *Id.*, at 1181-1182.

Respondent filed a 42 U. S. C. § 1983 action on September 14, 1994, moving for a temporary restraining order against any clemency proceedings in his case. *Id.*, at 1182. On September 16, a consent decree was entered, indefinitely postponing clemency proceedings. *Ibid.* The District Court rejected respondent's procedural due process, substantive due process, and Eighth Amendment claims. *Ibid.*

The Sixth Circuit reversed. It held that under *Evitts* v. *Lucey*, 469 U. S. 387 (1985) respondent had a protected liberty interest in clemency proceedings. See 107 F. 3d, at 1186-1188. The lower court also held that if Ohio fails to give respondent immunity during the clemency interview, it may create an unconstitutional condition in violation of respondent's Fifth Amendment privilege against self-incrimination and remanded for further determination of the nature of the APA's clemency procedures. See *id.*, at 1192-1193.

SUMMARY OF ARGUMENT

The federal judiciary cannot interfere with the clemency process. Clemency is an act of grace traditionally left to the unguided discretion of the executive. It is therefore not a proper subject for judicial review. *Evitts* v. *Lucey* does not extend to clemency procedures and therefore does not justify the decision below.

Any attempt to elevate Ohio's clemency procedures into constitutionally protected interests improperly discourages government benevolence. In *Sandin* v. *Conner*, this Court disapproved punishing a state for its good deeds by elevating prison rules to constitutional rights. The lesson of *Conner* applies with equal force to the present case.

A prisoner whose conviction is final has no privilege against self-incrimination regarding the circumstances of the conviction or sentence. The decision below, that Ohio threatened respondent's self-incrimination privilege by refusing to immunize his testimony during his commutation interview, violates numerous principles of the Fifth Amendment privilege. This effective right of immunity contradicts the rule that granting immunity is not a judicial function.

This ruling also fails to appreciate that the commutation interview does not threaten respondent with self-incrimination. Once his conviction became final, respondent's self-incrimination privilege expired with regard to his conviction and sentence. The possibility of collateral attack does not change the calculus, as habeas is a civil proceeding and the privilege does not exclude evidence in civil matters.

The commutation interview also lacks the compulsion that triggers the Fifth Amendment privilege. Respondent does not have to attend the interview. If he does attend, there is no reason to believe that he will be further punished if he invokes the privilege. The fact that invoking the privilege may harm his chances for commutation does not penalize his silence. The Constitution does not immunize individuals from having to make difficult choices.

The doctrine of unconstitutional conditions should not be expanded beyond the First Amendment. Its modern roots in *Perry*

v. *Sindermann* are in the First Amendment, as are its modern applications.

The original unconstitutional conditions cases do not change the analysis. Many of these decisions actually involved equal protection violations, not unconstitutional conditions. The other cases advanced the now discredited theory of economic due process.

The doctrine should remain limited to the First Amendment. Expanding the doctrine beyond the First Amendment will prevent many useful bargains for government benefits. Limiting the doctrine to the First Amendment allows it to protect the special privileges associated with this right, while minimizing the doctrine's cost.

ARGUMENT

I. The federal judiciary cannot interfere with the clemency process.

The first and clearest error in the opinion below was its unprecedented interference with a state's clemency procedure. *Amicus* will keep its discussion of this important point brief, as it expects petitioner to address this point in detail.

Any analysis of the judiciary's role in regulating clemency proceedings must begin with the great discretion traditionally given the executive branch for executing its clemency function. The exercise of clemency such as "a pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." *United States* v. *Wilson*, 7 Pet. 150, 160 (1833). This act of grace, "generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision." *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 464 (1981).

The responsibility for such an important, inevitably subjective decision is best left to the sole discretion of the chief executive. See The Federalist No. 74, pp. 447-448 (C. Rossiter ed. 1961) (A. Hamilton). "Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, *if ever*, appropriate subjects for judicial review." *Dumschat*, 452 U. S., at 464 (emphasis added; footnote omitted). In *Dumschat*, this Court found that the Connecticut Board of Pardons' practice of routinely commuting the sentences of most life prisoners did not create a protected liberty interest. See *id.*, at 465. This decision was centered on the deference courts accord these inherently subjective decisions, see *id.*, at 464, and the fact that the Board of Pardons had "unfettered discretion" to commute sentences.[2] See *id.*, at 466.

Clemency simply is not meant to be reviewed by the courts. Courts cannot develop standards to review a function that is the essence of subjectivity. "Individual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick* v. *Reed*, 419 U. S. 256, 268 (1974).

The *Dumschat* Court left open the possibility that equal protection could provide a reason to exercise judicial review over clemency. See 452 U. S., at 464, n. 9. While a court may entertain a challenge to a clemency procedure that on its face threatens equal protection rights, such as a rule limiting commutation to prisoners of a particular race, the present case does not raise this issue. Capital prisoners are different from the general prisoner population, and thus may be treated differently, a fact recognized by the court below. See *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1193 (CA6 1997).

Recognizing the barrier placed around clemency procedures by *Dumschat*, the Sixth Circuit sought an alternative to this decision in *Evitts* v. *Lucey*, 469 U. S. 387 (1985). See *Woodard*, 107 F. 3d, at 1186. *Evitts* held that the right to appointed counsel in the first appeal as of right first recognized in *Douglas* v. *California*, 372 U. S. 353, 357-358 (1963), included a right to effective assistance of counsel. 469 U. S., at 397. The problem

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2. This last reason, that taking discretion away from those overseeing prisoners creates a constitutionally protected liberty interest, was discredited in *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 429, 115 S. Ct. 2293, 2299-2300 (1995). See *post*, at 8.

with the Sixth Circuit's use of *Evitts* is that this Court has refused to extend *Evitts* or *Douglas* beyond the first appeal as of right.

Ross v. *Moffitt*, 417 U. S. 600, 602-603 (1974) involved an attempt to extend *Douglas* to discretionary review and certiorari petitions to this Court. *Douglas* had both due process and an equal protection component. *Id.*, at 608-609. *Ross* indicated that if *Douglas* extended to discretionary appeals, it would be under its equal protection rationale. See *id.*, at 611. This Court concluded that "[d]espite the tendency of all rights 'to declare themselves absolute to their logical extreme,' " *id.*, at 611-612 (quoting *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.)), *Douglas* had limits. "The question is not one of absolutes, but one of degrees." 417 U. S., at 612. Equal protection did not extend the right to counsel to discretionary review. *Ibid.*

The logic of *Ross* extends to collateral review. "Postconviction relief is even further removed from the criminal trial than is discretionary direct review." *Pennsylvania* v. *Finley*, 481 U. S. 551, 556-557 (1987). Therefore, neither due process nor equal protection justified extending the right to counsel to collateral review. See *id.*, at 557. In *Murray* v. *Giarratano*, 492 U. S. 1, 12 (1989) a plurality of this Court applied *Finley* to death row inmates, and in *Coleman* v. *Thompson*, 501 U. S. 722, 756-757 (1991), *Evitts* was not extended to an appeal from the denial of state habeas to a capital prisoner. Clemency is even farther removed from *Douglas* and *Evitts* than the limits established in *Ross*, *Finley*, *Murray*, and *Coleman*. Upholding the decision below would explode the boundaries of *Douglas* and *Evitts*, turning their limits into dead letters. Clemency is an executive, not a judicial function. This Court should reiterate this principle so mistakes such as the decision below are not repeated.

II. Elevating government benefits into constitutional rights improperly discourages government benevolence.

The decision below is an unfortunate example of invoking the Constitution to punish the good deeds of government. The Constitution does not require the state to have a clemency mechanism. See *Herrera* v. *Collins*, 506 U. S. 390, 414 (1993);

see also *Rogers* v. *Peck*, 199 U. S. 425, 436 (1905) (power of governor to grant pardons neither required nor withheld by the federal Constitution). As there is no constitutional right to clemency, Ohio's decision to allow the commutation of death sentences and to create a formal process for evaluating such requests for clemency is therefore voluntary. The Sixth Circuit's decision to burden Ohio's clemency process with the label of constitutionally protected interest punishes Ohio for its good intentions. While the Sixth Circuit meant to benefit capital prisoners, it may do more harm to them in the long run by discouraging Ohio and other states from regulating capital clemency. If a state can avoid judicial intrusion by leaving clemency to the unfettered discretion of the governor, or by abolishing clemency altogether, it may do so in order to avoid judicial intrusions similar to the one below.

This problem was a driving force behind this Court's recent turnaround in its prisoner rights jurisprudence. Beginning with *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), this Court examined prison regulations to determine whether the regulations created constitutionally protected liberty interests. See *Sandin* v. *Conner*, 132 L. Ed. 2d 418, 425-428, 115 S. Ct. 2293, 2297-2299 (1995) (reviewing cases). These cases developed into an examination of how much discretion state officials had to withdraw state-created benefits from prisoners: the more discretion, the less likely that the prisoner had a constitutional interest in the benefit. See *id.*, at 426-427, 115 S. Ct., at 2298. Thus in *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 11-12 (1979), state standards for granting parole were subjective and vague, calling for a prediction of future behavior, rather than an examination of the prisoner's past. While the Court accepted without explanation " 'respondents' view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection," *id.*, at 12, the procedures used were deemed adequate. *Id.*, at 16.

Conversely, in *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458 (1981), the Board had " 'unfettered discretion' " to commute sentences, with "no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied to the Board." *Id.*, at 466. Therefore, this entirely

discretionary power created no entitlement to be protected under due process. See *id.*, at 467.

This Court began to recognize the consequences of such perverse incentives in *Hewitt* v. *Helms*, 459 U. S. 460 (1983). "It would be ironic to hold that when a State embarks on such desirable experimentation [with procedural guidelines for discipline] it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedure provisions entirely avoid the strictures of the Due Process Clause." *Id.*, at 471. Yet *Hewitt* parsed the language of the relevant statute, and based on the choice of words found "that the State has created a protected liberty interest." *Id.*, at 472. After *Hewitt*, close examination of prison regulations for the extent of the discretion given to prison officials became the norm. See *Conner*, *supra*, 132 L. Ed. 2d, at 428, 115 S. Ct., at 2299 (discussing *Olim* v. *Wakinekona*, 461 U. S. 238 (1983) and *Kentucky Department of Corrections* v. *Thompson*, 490 U. S. 454 (1989)).

The irrationality of these cases was finally checked in *Conner*. "The approach embraced by *Hewitt* discourages this desirable development: States may avoid the creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." *Conner*, 132 L. Ed. 2d, at 429, 115 S. Ct., at 2299. The perversity of such incentives helped justify *Conner*'s decision to abandon the methodology embodied in *Hewitt*. See *id.*, at 429, n. 5, 115 S. Ct., at 2300, n. 5.

The *Conner* Court developed an intimate appreciation of the costs of *Wolff* and its successors. In addition to the disincentives for rulemaking, the old approach created the additional problem of dramatically increasing judicial interference with prisons. Thus, "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.*, at 429, 115 S. Ct., at 2299.

The present case poses similar concerns. Capital punishment is particularly diminished by delay. See *Gomez* v. *Fiero*, 136 L. Ed. 2d 204, 204, and n. 1, 117 S. Ct. 285, 285, and n. 1 (1996) (Stevens, J., dissenting); *In re Blodgett*, 502 U. S. 236, 239 (1992) (*per curiam*). By adding yet another layer of constitutional law to this field, the decision below threatens to turn clemency into

another source of collateral litigation, inevitably adding yet more expense and delay. This will undoubtedly deter states from exposing their commutation and pardon powers to the federal courts.

The fact that clemency is the traditional means for providing a "fail safe" to protect the factually innocent from capital punishment, see *Herrera*, 506 U. S., at 415, does not change this calculus. The *Herrera* Court understood that states were not required to provide either clemency or any particular clemency procedure. See *id.*, at 414. Some states have been unwilling to vest the clemency power solely in the executive, instead splitting the power between an advisory board and the governor. See *ibid.* Such states often have specific, detailed clemency procedures. See *id.*, at 416 (discussing Texas' clemency procedure). Encumbering these proceedings with the Due Process Clause will either deter states from having clemency procedures or rob executive clemency of its necessary informality. See *id.*, at 413 (quoting from *United States* v. *Wilson*, 7 Pet. 150, 160-161 (1833) (Marshall, C.J.)).

Rulemaking can be very beneficial. In *Conner*, this Court noted that prison rulemaking encourages uniform treatment of prisoners, limits staffers' authority over prisoners, and instructs personnel on how to exercise their discretion. See 132 L. Ed. 2d, at 428-429, 115 S. Ct., at 2299. Rules may provide a similar benefit to the clemency process, giving the prisoners some idea of their rights and responsibilities, and informing, or possibly even controlling, the executive's discretion. Yet a delicate balance must be struck between the rules and necessary discretion. Interjecting the Due Process Clause into this mix will disrupt the balance. The states, our national laboratories, see *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), should be allowed to experiment with their commutation and pardon powers. This Court should reiterate the principles of *Conner* to deter future disruptions from the federal courts.

III. A prisoner whose conviction is final has no privilege against self-incrimination regarding the circumstances of the conviction or sentence.

The decision below also erred by creating a right to immunity for capital prisoners seeking commutation. The Sixth Circuit accepted Woodard's argument that "the Ohio procedure calls for death row inmates to make a 'Hobson's Choice' between asserting the Fifth Amendment right [against self-incrimination] and participating in the clemency review process." *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1189 (CA6 1997). While it felt that it lacked the evidence to hold that this was a violation of defendant's self-incrimination privilege, the Sixth Circuit did require Ohio to find a compelling state interest to justify "requiring" a respondent to waive his self-incrimination privilege during his clemency interview. See *id.*, at 1189. The Sixth Circuit hinted that a grant of immunity under the auspices of the Fifth Amendment would protect respondent's privilege if Ohio failed the compelling interest test. See *id.*, at 1193.

This request for immunity contradicts the principle that courts are not in the business of immunizing witnesses, which is "peculiarly an executive" task. *Pillsbury Co.* v. *Conboy*, 459 U. S. 248, 261 (1983). More importantly, the decision below overlooks the two conditions necessary for invoking the privilege, self-incrimination and compulsion. Since the commutation interview does not conflict with either interest, Woodard's self-incrimination privilege is not threatened by the interview.

A. No Self-Incrimination.

When discussing the self-incrimination properties of the clemency interview, the Sixth Circuit ignores the fact that respondent has been convicted of the crimes he now seeks commutation for. The trial on the merits is the "main event" in criminal procedure. *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977). Respondent's conviction ended his presumption of innocence. *Herrera* v. *Collins*, 506 U. S. 390, 399 (1993). Barring retrial, any subsequent proceeding concerning respondent's conviction is truly collateral and thus cannot incriminate respondent with regard to his underlying conviction.

The opinion below states that "a prisoner who still has ongoing post-conviction proceedings (such as Woodard) *obviously* has a measurable interest in avoiding self-incrimination." See *Woodard*, *supra*, 103 F. 3d, at 1189 (emphasis added). This is far from obvious. The privilege only protects individuals from conviction; adverse collateral attacks are irrelevant to the privilege. Habeas corpus is a civil proceeding. *Browder* v. *Director, Ill. Dept of Corr.*, 434 U. S. 257, 269 (1978). It has been long settled that the privilege does not protect the disclosure of facts adverse to civil liability. See 8 J. Wigmore, Evidence §2254, at 331 (McNaughten rev. 1961). While the privilege may be claimed in "*any proceeding*" it simply protects " 'any *disclosures* which the witness may reasonably apprehend *could be used in a criminal prosecution or which could lead to other evidence that might be so used.*' " *In re Gault*, 387 U. S. 1, 47, 48 (1967) (quoting *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 94 (1964) (White, J., concurring) (emphasis added by the *Gault* Court)).

Holding an adverse habeas proceeding to be a form of incrimination runs contrary to the purpose of the privilege. "[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.' " *Tehan* v. *Shott*, 382 U. S. 406, 415 (1966). In a habeas proceeding, it is the petitioner who has the burden of proof. See *Hawk* v. *Olson*, 326 U. S. 271, 279 (1945). There is simply no reason to justify the lower court's expansion of the privilege. Therefore, "notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled, they are inadmissible in a subsequent trial for a crime *other than for which he has been convicted*." *Minnesota* v. *Murphy*, 465 U. S. 420, 426 (1984) (emphasis added).

Indeed, even threatened deprivation of liberty is not necessarily enough to invoke the privilege. A commitment proceeding that seeks to treat, as opposed to punish, sexually dangerous persons by committing them to the appropriate psychiatric institutions is not "criminal" for the purposes of the Fifth Amendment. See *Allen* v. *Illinois*, 478 U. S. 364, 372-373 (1986). A collateral

attack on a presumptively valid conviction cannot be even remotely criminal under the Fifth Amendment.

The decision below also runs contrary to the tenor of this Court's habeas jurisprudence. An important aspect of many recent habeas decisions is this Court's much more lenient treatment of petitioners with strong claims of innocence. See *Herrera* v. *Collins*, 506 U. S. 390, 404 (1993). Invoking the Fifth Amendment to prevent evidence of the correctness of the guilt finding or the sentence is contrary to the sense of justice found in these decisions. Once a prisoner's conviction is final, there is no reason to hide additional evidence of his guilt from courts conducting collateral review.

The Sixth Circuit also noted the possibility of respondent inculpating himself for crimes unrelated to his underlying conviction during his commutation interview. See *Woodard*, 107 F. 3d, at 1189. This risk is too remote to warrant a preemptive grant of immunity. Respondent's risk of further prosecution is rendered even more remote by the fact that admitting to uncharged crimes is unlikely to lead to a commutation. If respondent has a substantial, previously unknown, criminal history, it further demonstrates his danger to society, reinforcing the propriety of his death sentence. Finally, Woodard, like any other party to a civil proceeding, can invoke his Fifth Amendment privilege and refuse to answer incriminating questions.

B. No Compulsion.

Even if respondent's interview subjected him to additional criminal liability, his Fifth Amendment privilege would not be violated. An essential component of any claim under the self-incrimination privilege is compulsion. "No person . . . shall be *compelled* in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5 (emphasis added). The Sixth Circuit's failure to appreciate this point is its second fundamental misinterpretation of the self-incrimination privilege.

The fact that respondent could claim the privilege at any proceeding where a question may incriminate him, see *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973), does not change the compulsion requirement. If respondent voluntarily incriminates himself, then the privilege does not apply.

> "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters of which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U. S. 424, 427 (1943) (footnote omitted); accord, *Minnesota* v. *Murphy*, 465 U. S., at 427.

Respondent is not compelled to testify at the commutation interview. He has not been subpoenaed. He was asked if he wanted an interview. See *Woodard*, 107 F. 3d, at 1181-1182. Whether he speaks is a decision left entirely to respondent. Respondent simply is not subject "to the cruel trilemma of self-accusation, perjury or contempt . . . ." *Murphy* v. *Waterfront Commission*, 378 U. S., at 55.

The fact that respondent seeks to overturn his death sentence cannot create compulsion where it otherwise does not exist. The general rule is that a witness must assert the self-incrimination privilege or lose it; one who voluntarily speaks cannot later complain that the incriminating testimony was compelled. See *Minnesota* v. *Murphy*, 465 U. S., at 429. While there are a handful of exceptions to this rule, none of them apply to the present case.

The best known example of a self-executing Fifth Amendment privilege is the rule of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See 465 U. S., at 429-430. In *Minnesota* v. *Murphy*, *Miranda* was distinguished because the coercive circumstances of the station-house were absent. See *id.*, at 433. The commutation interview is similarly distinguishable from *Miranda*. The commutation interview is voluntary, and meant to determine whether an already convicted prisoner warrants an act of mercy. This does not "convey to the *suspect* a message that he has no choice but to submit to the officers' will and to confess." *Ibid.* (emphasis added). The prisoner at a commutation interview will not feel that he cannot leave until he confesses. Cf. *ibid.* *Miranda*, which deals with a different, potentially more coercive stage of a criminal procedure, cannot govern the present case.

The privilege is also self-executing in the " 'penalty' cases" where "the state not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amend-

ment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Fifth Amendment forbids.' " *Minnesota* v. *Murphy*, 465 U. S., at 434 (quoting *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 806 (1977)). In *Minnesota* v. *Murphy*, defendant had been a probationer subject to the condition that he attend a treatment program for sex offenders, report to his probation officer, and be truthful to the probation officer " 'in all matters.' " 465 U. S., at 422. During his treatment, defendant admitted to a counselor that he committed an earlier rape and murder, and the counselor relayed the confession to Murphy's probation officer. *Id.*, at 423. At a subsequent meeting with the probation officer about his failure to continue treatment, Murphy was confronted with his confession, which he reaffirmed.

The threat of probation revocation for untruthful answers did not constitute a penalty that made the privilege self-executing. Had the state forced Murphy to make these incriminating statements or lose his probationary status, then his privilege would have been executed. See *id.*, at 435. As the probation condition only penalized false statements, this Court concluded that Minnesota would not punish a probationer who invoked his Fifth Amendment privilege. See *id.*, at 437-438. Any belief that Minnesota would attempt to do so was unreasonable. *Id.*, at 438.

The argument against compulsion is even stronger in the present case. Unlike Murphy, respondent is not free. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U. S. 458, 464-465 (1981) (no constitutionally protected liberty interest in commutation). Clemency is an essentially unreviewable act of grace. See *ante*, at 4-5. If Ohio wishes to take into account respondent's failure to admit to his current or other crimes, it should be free to do so. So long as respondent receives no added punishment for invoking his privilege, such as through a contempt finding, Ohio does not violate his Fifth Amendment rights. As in *Minnesota* v. *Murphy*, it is unreasonable to believe Ohio will act this way. If respondent wishes to avoid incriminating himself, he must invoke his privilege at his commutation hearing. The Fifth Amendment affords no more protection.[3]

The Sixth Circuit's invocation of the Fifth Amendment privilege seeks to free death row inmates from a potentially unpleasant choice. See *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1189 (CA6 1987). It is a constitutional fact of life that the government may confront its citizens with unpleasant choices concerning their constitutional rights. "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *United States* v. *Dunnigan*, 507 U. S. 87, 96 (1993). This applies with particular force to the self-incrimination privilege. " '*That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.*' " *United States* v. *Rylander*, 460 U. S. 752, 759 (1983) (quoting *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970) (emphasis added by the *Rylander* Court)).

Respondent does not deserve a free ride; Ohio can require him to make a choice.

Nor should the Eighth Amendment step in where the Fifth does not tread. The Eighth Amendment has been construed to regulate capital punishment at trial; once the trial is over, a capital defendant deserves no extra privileges. See *Murray* v. *Giarratano*, 492 U. S. 1, 9 (1989) (plurality). If the right to counsel is not extended to collateral review in a capital case, see *Coleman* v. *Thompson*, 501 U. S. 722, 752 (1991), there is even less reason to invoke the Eighth Amendment to extend the Fifth Amendment privilege where it otherwise would not reach.

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3. The last instance of self-executing privilege that occurs "in the context of the federal occupational and excise taxes on gamblers," *Minnesota* v. *Murphy*, 465 U. S., at 439, does not apply to present case. The gambling exception exists because "claiming the privilege in lieu of filing a tax return would tend to incriminate . . . ." *Ibid.* Woodard does not run this risk, as he may refuse to answer any incriminating question without risking further incrimination. See *ante*, at 12.

IV. The doctrine of unconstitutional conditions should be limited to the First Amendment.

The decision below extends the doctrine of unconstitutional conditions into previously uncharted territory. Its holding that the doctrine of unconstitutional conditions bars placing burdens on the self-incrimination privilege in exchange for government benefits, see *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1189 (CA6 1997), cannot be allowed to stand. Unconstitutional conditions is a difficult, potentially dangerous doctrine that should be confined to the First Amendment.

A. First Amendment Roots.

In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), this Court formulated a dictum that should not be allowed to govern the present case. The *Perry* Court was confronted with a claim by a nontenured junior college teacher that his contract was not renewed because he publicly criticized his superiors. This failure to renew was claimed to violate his First Amendment rights. *Id.*, at 595.

In holding that Sindermann's lack of tenure did not bar his First Amendment claim, the *Perry* Court made the following pronouncement:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.*, at 597.

To the extent that it goes beyond the First Amendment, this statement is dictum. *Perry* was a First Amendment case. Whether the unconstitutional conditions benefits doctrine applied beyond the First Amendment was not an issue. As the present case does not involve an attempt by the government to purchase an individual's First Amendment rights, *Perry* and its ilk do not apply.

Any indication from *Perry* that the government may not condition the receipt of a government benefit upon the waiver of

any government right is contrary to this Court's precedents. This Court has often upheld the waiver of a constitutional right in exchange for some government benefit. See part IV B, *post*. Neither *Perry* nor any other of this Court's decisions have invalidated such consents under the *Perry* dictum. Therefore, there is some limit to the *Perry* dictum. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994).

The limit of this dictum is seen in *Perry* itself. *Perry* was a First Amendment case dealing with an alleged denial of employment because of the employee's exercise of his free speech rights. As the *Perry* Court recognized, the First Amendment was at the heart of the denial of government benefits doctrine. Thus, the *Perry* doctrine was "especially" concerned with protecting the employee's "interest in freedom of speech." *Perry*, 408 U. S., at 597.

The First Amendment limits of *Perry* are further reinforced by the authorities it cites. It noted that denying benefits because of the exercise of First Amendment rights "would allow the government to 'produce a result which [it] could not command directly.' " *Ibid.* (citing *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)). The *Perry* Court then noted that "[w]e have applied this general principle" to the denial of various monetary benefits, citing numerous cases. See 408 U. S., at 597.

None of the authorities cited by *Perry* involved denying a government benefit for the exercise of a right outside the First Amendment. Several cases cited by *Perry* did not involve conditioning benefits on giving up some other right, but instead involved denials of benefits that were directly challenged as unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969) (one-year residence requirement for welfare payments violates equal protection); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971) (denial of welfare to aliens violates equal protection); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 894 (1961) (denial of cook's access to military installation did not violate due process). Other cases cited by *Perry* involved loyalty oaths. Some invoked the First Amendment and others the due process "vagueness" doctrine, but all involved a severe impact on speech or association. See *Whitehill* v. *Elkins*, 389 U. S. 54, 59-62

(1967); *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287-288 (1961); *Speiser*, *supra*, 357 U. S., at 529; *Wieman* v. *Updegraff*, 344 U. S. 183, 185-186, 191-192 (1952). The other cases involved a variety of First Amendment issues. See *Pickering* v. *Board of Education*, 391 U. S. 563, 574-575 (1968) (speech); *United States* v. *Robel*, 389 U. S. 258, 266-268 (1967) (association); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 608-609 (1967) (association); *Elfbrandt* v. *Russell*, 384 U. S. 11, 16 (1966) (association); *Sherbert* v. *Verner*, 374 U. S. 398, 405-406 (1963) (free exercise of religion); *Torcaso* v. *Watkins*, 367 U. S. 488, 494-496 (1961) (establishment of religion); *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960) (association); *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (partisan speech and association). See *Perry*, *supra*, 408 U. S., at 597. *Perry* had no support to extend its reach beyond the First Amendment.

Other decisions reinforce the First Amendment limits on *Perry*. Although this Court made a similarly expansive statement in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983),[4] the only authority it cites to support this claim is *Perry*, a First Amendment case. See *id.*, at 545. Furthermore, *Taxation With Representation* is itself a First Amendment case, where this Court held that there was no First Amendment right to require Congress to give tax-exempt status to nonprofit organizations that engaged in lobbying. See *ibid.* Any implication that *Perry* extends beyond the First Amendment is dictum.

Other decisions demonstrate the First Amendment limits of *Perry* more directly. In *Connick* v. *Myers*, 461 U. S. 138 (1983), this Court traced the development of the rights of public employees. It noted that initially, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. The *Connick* Court then traced the history of the public employee rights cases, see *id.*, at 144, and came to the following conclusion. "In *all* of these cases, the precedents in which *Pickering* [v. *Board of Education*,

4. "The government may not deny a benefit to a person because he exercises a constitutional right." 461 U. S., at 545.

391 U. S. 563 (1968)] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees *to participate in public affairs*." 461 U. S., at 144-145 (emphasis added). *Perry*, one of *Pickering*'s "progeny," *id.*, at 143, stands for the principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*, at 142. This is the proper limit of *Perry*.

The limits on *Perry* were in place even before that decision was written. An integral part of *Perry* was the rule that whether a benefit was a right or privilege was irrelevant to what conditions the government could place on the exercise of the benefit. As *Perry* noted, "respondent's lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech claim." 408 U. S., at 597-598. The precedent that discredited the right-privilege distinction was grounded in the First Amendment.

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that *the liberties of religion and expression* may be infringed by the denial of or placing conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963) (emphasis added).

B. The Property Cases.

In a dim, discredited part of this Court's past, some decisions applied the unconstitutional conditions doctrine outside the First Amendment. These cases reached their apex in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311 (1931), in which an order of the Interstate Commerce Commission conditioning its approval of the bankrupt railroad's reorganization plan on the creation of an impound fund to be dispersed at the discretion of the bankruptcy court or the commission, see *id.*, at 319-322, was declared unconstitutional. See *id.*, at 327-328. In reaching this conclusion this Court stated, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.*, at

328-329. This rule was fashioned to protect the substantive due process doctrine typified by the discredited *Lochner* v. *New York*, 198 U. S. 45 (1905). See Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1416 (1989). It "was invented by a laissez-faire Court bent on dismantling progressive legislation that reduced the liberty of corporations . . . ." *Id.*, at 1505.

The *Lochner*-type cases have, of course, long since been repudiated. See *Washington* v. *Glucksberg*, 521 U. S. ___, 65 U. S. L. W. 4669, 4684-4686 (June 26, 1997) (Souter, J., concurring in the judgment) (tracing history). *Chicago, M. St. P. & P. R. Co.* and its antecedents "produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism *foredoomed to reversal*." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230 (1948) (emphasis added). *Mandeville Island Farms* notes *Chicago, M. St. P. & P. R. Co.* and implies it was contradicted by *United States* v. *Lowden*, 308 U. S. 225, 240 (1939). 334 U. S., at 230, n. 9. The rights these decisions sought to protect are no longer the law, and their legal philosophy has been thoroughly discredited by this Court. See *Ferguson* v. *Skrupa*, 372 U. S. 726, 731-732 (1963). They are no longer valid, and cannot be applied to the present case.

Many of these decisions grew from a response to an aberrant, discredited decision. In *Paul* v. *Virginia*, 8 Wall. 168, 181 (1869), this Court viewed corporations as the recipients of "special privileges" granted by the state. Since "it might be of the highest public interest that the number of corporations in the State should be limited," *id.*, at 182, this Court determined that a state's consent to the formation of a domestic corporation, or entry of a foreign corporation "may be granted upon such terms and conditions as those States may think proper to impose." *Id.*, at 181. This doctrine spawned a series of decisions upholding discriminatory conditions, usually in the form of taxes, on the entry of foreign corporations into a state. See *Western & Southern Life Ins. Co.* v. *Board of Equalization*, 451 U. S. 648, 660-662 (1981). The cases that turned back these decisions invoked a mix of the unconstitutional conditions doctrine and equal protection. See *id.*, at 662-666.

Before the first unconstitutional conditions cases were decided, the legal underpinnings of *Paul* had eroded. First, in the late 19th century, laws of general incorporation spread through the country, taking away the corporation's status as a special privilege. *Id.*, at 659. Second, the Fourteenth Amendment, ratified in 1868, prevented "the States from acting arbitrarily or treating similarly situated persons differently, *even with respect to privileges formerly dispensed at the State's discretion.*" *Id.*, at 660 (emphasis in original). This Court was slow to recognize these developments, see *ibid.*, thus the doctrine of unconstitutional conditions developed. See *id.*, at 661-662. The most important of these cases, *Southern R. Co.* v. *Greene*, 216 U. S. 400 (1910), see 451 U. S., at 662, rejected a state condition on equal protection grounds. See 216 U. S., at 417-418; see 451 U. S., at 663. Equal protection has thus become and remained the norm for analyzing state conditions on entry of foreign corporations. See 451 U. S., at 664-668. Because the conditions are themselves equal protection violations, and because incorporation is no longer a privilege, these cases are not truly part of the unconstitutional conditions doctrine.

Nor does *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) extend the government benefits doctrine beyond the First Amendment, despite the assertions of some. Cf. Sullivan, *supra*, 102 Harv. L. Rev., at 1463. In *Nollan*, the California Coastal Commission conditioned its permission to allow Nollan to build on his property on his granting a public easement through his property. 483 U. S., at 828. The Court found that this was a taking. *Id.*, at 837. It also found that this was not a government benefits decision, holding that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.' " *Id.*, at 833-834, n. 2.

This severs *Nollan* from the conditions cases. In *Perry* and its successors, the government conditioned some financial benefit, such as government employment, on the recipient agreeing to waive a First Amendment right. See, *e.g.*, *Perry*, *supra*, 408 U. S., at 594-595 (state junior college teacher allegedly discharged for public criticism of Board of Regents); *Board of County Commissioners* v. *Umbehr*, 135 L. Ed. 2d 843, 849, 116 S. Ct. 2342, 2345

(1996) (trash hauling contract with county terminated in retaliation for contractor's public criticism of County Board).

In *Nollan*, the "bargain," the requested building permit, and the condition, the easement, were both government restrictions on the Nollans' use of their property. See 483 U. S., at 831 (easement); *id.*, at 834 (regulations). Since both types of restriction could effect an unconstitutional taking, see *ibid.*, each had to pass constitutional muster. The regulatory scheme that forced the Nollans to get a building permit before they could build on their lot was presumed to advance a sufficiently important state interest to pass constitutional muster. See *id.*, at 835. If the easement could be justified by the same interest, then there would be a constitutionally acceptable nexus between the easement condition and the building permit. See *id.*, at 836-837.

The *Nollan* Court justified its nexus rationale by the logic that if a more restrictive regulation is permissible, then a less restrictive regulation in the form of a government condition must also be constitutional. As this Court concluded when analyzing a hypothetical condition involving a condition even more invasive than the easement in *Nollan*:

> "Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." *Ibid.*

This is the same logic as found in the most cogent criticism of the unconstitutional conditions doctrine. "Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 53 (1910) (Holmes, J., dissenting). While they may have surface

similarities, *Nollan* and *Perry* are two different species of constitutional cases.

Dolan v. *City of Tigard*, 512 U. S. 374 (1994) does not change the relationship between the Takings Clause and the unconstitutional conditions doctrine. In one passage, the *Dolan* Court includes the Takings Clause with the rights protected under unconstitutional conditions. See *id.*, at 385. *Dolan* followed *Nollan* and applied its nexus standard. See *id.*, at 386. The *Dolan* Court simply found that while there was a nexus between a legitimate state interest and the permit conditions, see *id.*, at 387, there was not a reasonable relationship between the two. See *id.*, at 394-395. Since there was no change from the *Nollan* analysis, the unconstitutional conditions in dictum in *Dolan* should not be allowed to govern the present case.

More recent pronouncements from this Court recognized that the unconstitutional conditions doctrine is an aspect of the First Amendment. "[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes on his constitutionally protected . . . freedom of speech.' " *Umbehr*, *supra*, 135 L. Ed. 2d, at 851, 116 S. Ct., at 2347 (quoting *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972)). There are good reasons for these limits. As the next section will demonstrate, many constitutional rights outside the First Amendment have been waived in exchange for government benefits. It thus would be impractical and dangerous to now endanger these agreements.

C. The Benefit of the Bargain.

Although it is often good practice to avoid "the tyranny of labels" when deciding cases, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934), it is necessary to pay attention to the labels in the present case. The court below understood that the unconstitutional conditions doctrine had been largely confined to First Amendment cases. See *Woodard* v. *Ohio Adult Parole Authority*, 107 F. 3d 1178, 1190 (CA6 1997). It invoked *Nollan* and *Dolan* to justify extending this doctrine to the Fifth Amendment's

privilege against self-incrimination. See *ibid.*[5] Unless carefully limited, the label "unconstitutional conditions" is likely to seep out of its First Amendment basis.

This doctrine should not go beyond its natural boundary found in the First Amendment. As Justice Holmes noted in his *Western Union* dissent, the doctrine has logical difficulties; if the government is not constitutionally compelled to provide a benefit, it should be able to add conditions to the benefit. See *ante*, at 22. So long as the decision to accept the benefit is voluntary, then an individual should be able to consent to foregoing a constitutional right in exchange for some government benefit.

A voluntary bargain is presumed to benefit both sides; if one side would be disadvantaged, then that side would not enter into the bargain. Therefore, the unconstitutional conditions doctrine threatens to harm those it seeks to protect by depriving them of the benefit of their bargains; if the government is not allowed to condition a benefit on some constitutional waiver it may withdraw or modify the benefit to the detriment of both the government and the beneficiary.

> "If people can obtain benefits from selling their rights, why should they be prevented from doing so? One aspect of the value of a right—whether a constitutional right or title to land—is that it can be sold and both parties to the bargain made better off. A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action." Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information, 1981 S. Ct. Rev. 309, 347 (footnotes omitted).

This Court also appreciates the axiom that if something cannot be sold, that is, surrendered in exchange for something of value, it becomes less valuable. See *Andrus* v. *Allard*, 444 U. S. 51, 66

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5. The Court of Appeal also cited *Shapiro* v. *Thompson*, *supra*, to justify extending the conditions doctrine beyond the First Amendment. See *ibid.* *Shapiro*, however, is distinguishable as involving an unconditional action that was itself unconstitutional. See *ante*, at 17.

(1979) (regulations preventing the sale of certain Indian artifacts reduces their value, but is not a taking). Overextending the unconstitutional conditions doctrine will "imprison a man in his privileges and call it the Constitution." See *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942).

This helps explain why this Court has upheld constitutional bargaining when First Amendment rights are not involved.

The plea bargain, when defendant exchanges a plea of guilty for a reduced charge, is "an essential component of the criminal process which [p]roperly administered, . . . is to be encouraged." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). It involves a particularly important set of interests: the criminal defendant's trial rights and the prosecution's essential function of charging crimes. The importance of these interests initially raised grave concerns with the courts over their voluntariness. Cf. *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void").

Over time, this Court came to recognize that even agreements of this gravity were voluntary. Since both the prosecution and defense have something to gain from the plea bargain, "[i]t is this *mutuality of advantage*" that explains the prevalence and acceptability of these agreements to waive rights. See *Brady* v. *United States*, 397 U. S. 742, 752 (1970) (emphasis added). This mutual advantage meant that a plea motivated by a risk of a higher sentence if the case went to trial was still voluntary. *Id.*, at 751.

Mutually beneficial consents are found elsewhere in this Court's constitutional precedents. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), federal law required pesticide developers to include trade secrets among the data they submitted to the Environmental Protection Agency (EPA) to allow the agency to determine whether the pesticide was safe enough to market. *Id.*, at 995-996. This information could be used by the EPA to evaluate other companies' pesticides. *Id.*, at 1006. Consent made certain that prospective application of this scheme did not constitute a taking under the Fifth Amendment.

> "Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally

related to a legitimate Government interest, *a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.*" *Id.*, at 1007 (emphasis added).[6]

In *Zap* v. *United States*, 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947),[7] contractual consent to government searches was recognized as a valid waiver of Fourth Amendment rights. Petitioner Zap, who contracted with the Navy to do experimental work on airplane wings, was convicted of filing a false claim with the government. *Id.*, at 625-626. A key piece of evidence against Petitioner was a check made out to a test pilot that Zap used to defraud expense money from the government. See *id.*, at 628.

Zap's contract with the Navy contained the following consent: " 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' " *Id.*, at 627. Invoking this condition, the government sent two Federal Bureau of Investigation agents to Zap's business posing as Navy auditors. During the audit, the agents discovered the incriminating check. *Ibid.*

The *Zap* Court upheld the search because of the contractual consent. "[W]hen petitioner, *in order to obtain the Government's business*, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.*, at 628 (emphasis added). This contractual consent governed the legality of the search. Since the contract allowed inspection by any authorized government agents, the fact that the inspectors worked for the F.B.I. instead of the Navy

6. When the pesticide developers had reason to believe that the trade secrets they submitted would be kept secret, use of this information to benefit others would constitute a taking. See *id.*, at 1011.

7. The order vacating *Zap* cited *Ballard* v. *United States*, 329 U. S. 187 (1946). *Zap*, *supra*, 330 U. S., at 801. *Ballard* held that women could not be systematically excluded from federal grand and petit juries. 329 U. S., at 195.

Department did not detract from the legality of the search. *Id.*, at 628-629. The consent agreement made the search reasonable.

Although *Zap* was not mentioned, this Court applied closely analogous reasoning in *Wyman* v. *James*, 400 U. S. 309 (1971). *Wyman* dealt with a New York regulation conditioning receipt of Aid to Families with Dependent Children (AFDC) grants on the recipient's consent to home visits by social workers. See *id.*, at 310. The *Wyman* Court upheld this regulation against Fourth Amendment attack, holding that there was no "search . . . in the Fourth Amendment meaning of that term." *Id.*, at 317. Consent helped take the visit out of the Fourth Amendment.

> "We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. *If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be.* There is no entry of the home and there is no search." *Id.*, at 317-318 (emphasis added).

There is no meaningful difference between *Wyman* and *Zap*.[8] In both cases, the government conditioned an important fiscal reward on the recipient's consent to government intrusion. Whether labeled a consent search or no search at all, in both cases consent obtained in exchange for government consideration made the intrusion legal.

This Court has upheld the idea that the consent necessary for a bargain can be obtained in the face of substantial state power. Every day in this country defendants enter guilty pleas because of the dire possibilities if they go to trial. In *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), the prosecution threatened to charge defendant as an habitual criminal carrying a life sentence if he did not " 'save the court the inconvenience and necessity of a trial' " and plead guilty to a crime carrying a sentence of 2 to 10 years. *Id.*, at 358. When defendant refused to accept the bargain, the prosecutor carried out his threat, and defendant was convicted and

8. *Wyman* also promulgated an alternative holding that even if the consent were not voluntary, the search would still be reasonable. *Id.*, at 318. This does not supplant the consent holding, but is instead based on a hypothetical assumption that the consent was invalid. See *ibid.*

received a life sentence. *Id.*, at 359. This Court upheld the sentence, allowing prosecutors to present defendants with such "unpleasant alternatives . . . ." *Id.*, at 365.

Ohio does not have to give respondent the opportunity to speak at his clemency hearing. It should be allowed to hold respondent responsible for what he says at the hearing. Any contrition, for instance, would be much less sincere if made under a grant of immunity. If Ohio and other states are not allowed to structure their commutation and other criminal procedures to get the benefit of the bargain, they may withdraw such benefits entirely, impoverishing all concerned. See Part II, *ante*.

D. Preserving the Doctrine.

Although the unconstitutional conditions doctrine can be costly and unwieldly, it does not have to be abandoned. There are good reasons for this Court's decision to limit this doctrine to the First Amendment. The First Amendment protects a particularly important and fragile set of rights. In the public employment cases,

> "[t]he issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)." *Connick* v. *Myers*, 461 U. S. 138, 145 (1983).

The special needs of the First Amendment are found in other doctrines as well. The doctrine of overbreadth, for example, gives claimants who are not engaged in constitutionally protected conduct the extraordinary standing to attack a statute on the ground that it may violate the First Amendment rights of others not before the Court. See *Forsythe Co.* v. *Nationalist Movement*, 505 U. S. 123, 129 (1992). This doctrine, which is limited to the First Amendment, see *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), contrasts with the general rule of standing in constitutional cases that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Another example of the special needs of the First Amendment is found in the rule that the government may only regulate the content of protected speech if it uses "the least restrictive means" of advancing a compelling interest. See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115, 126 (1989); see also *Reno* v. *ACLU*, 521 U. S. ___, 65 U. S. L. W. 4715, 4723 (June 26, 1997). This is inapplicable to the Fifth Amendment privilege, which looks to official misconduct and voluntariness. See *Colorado* v. *Connelly*, 479 U. S. 157, 170 (1986).

The unconstitutional conditions doctrine should be similarly limited to the First Amendment. This would confine the doctrine to an essential but limited concern—the ability of the government to use its resources to "buy" the suppression of unwanted speech, beliefs, or associations. This focus is most vividly demonstrated in the area of subsidies. In *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983), this Court upheld tax regulations denying tax exemptions to organizations that engaged in lobbying. The basis of the decision was that government was free to give and withdraw subsidies so long as the action is "not ' "aimed at the suppression of dangerous ideas" ' . . . ." *Id.*, at 550 (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959)). Outside of the suppression of ideas, the government's " 'power to encourage actions deemed to be in the public interest is necessarily far broader.' " 461 U. S., at 550 (quoting *Maher* v. *Roe*, 432 U. S. 464, 476 (1977)).

Similar considerations motivate the *Perry* line. Not all First Amendment activity is beyond the power of the government's purse. The primary purpose of the government employee cases was the protection of a core First Amendment right, "speech on matters of public concern." *Connick*, *supra*, 461 U. S., at 145. The limits of *Perry* are not beyond, but are instead within, the First Amendment. So long as it does not suppress ideas, the government may place conditions on "benefits."

> "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary* in the name of the First Amendment." *Id.*, at 146 (emphasis added, footnote omitted).

The Self-Incrimination Clause does not deal with the suppression of ideas and therefore should not be subject to the *Perry* dictum. Whatever may be the actual scope of *Perry*, "its antecedents, and its progeny," the doctrine of these decisions does not apply to the present case.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals should be reversed.

August, 1997

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

No. 96-1769

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, *et al.*,

Petitioners,

—v.—

EUGENE WOODARD,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF OHIO IN SUPPORT OF RESPONDENT

Diann Y. Rust-Tierney
American Civil Liberties Union
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Joan M. Englund
ACLU of Ohio Foundation, Inc.
1266 West Sixth Street
Cleveland, Ohio 44113
(216) 781-6276

Daniel T. Kobil
(Counsel of Record)
Capital University Law School
303 East Broad Street
Columbus, Ohio 43215
(614) 236-6675

Steven R. Shapiro
American Civil Liberties Union
125 Broad Street
New York, New York 10004
(212) 549-2500

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Ohio is one of its statewide affiliates. The ACLU has participated in numerous death penalty cases before this Court and has long taken the position that the state must scrupulously obey due process requirements when it seeks to impose the death penalty. The outcome of this case is, therefore, a matter of great concern to the ACLU and its members.

STATEMENT OF THE CASE

Under the Ohio constitution, the governor has authority to grant clemency; the clemency process, however, is subject to legislative regulation. OHIO CONST. art. III, §11. The General Assembly has exercised that authority by enacting a comprehensive statutory scheme designed to assure that the governor's clemency decisions are well-informed. In particular, Ohio law requires that the Adult Parole Authority (APA) conduct a "thorough investigation" of whether clemency is warranted, and issue a written report and recommendation to the governor. Ohio Rev. Code §2967.07 (Anderson 1996).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The APA may recommend clemency if "such action would further the interests of justice and be consistent with the welfare and security of society." Ohio Rev. Code §2967.03 (Anderson 1996). Prior to recommending clemency, the APA must notify the prosecuting attorney and trial judge in the sentencing jurisdiction, as well as the victim's representative, of the pendency of clemency. Ohio Rev. Code §2967.12 (Anderson 1996). The failure of the APA to fulfill its duties invalidates any pardon or commutation issued by the governor. *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369 (Ohio 1994); OHIO CONST. art. III, §11 (as amended Jan. 1, 1996).

Eugene Woodard was convicted of murder in Ohio and sentenced to death. His conviction and sentence were affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. *State v. Woodard*, 623 N.E.2d 75 (1993), *cert. denied*, 512 U.S. 1246 (1994). He was originally scheduled to die on October 7, 1994. On August 24, 1994, the Ohio Supreme Court stayed the execution date so that Woodard could pursue post-conviction relief.

Two weeks later, Woodard was notified by the APA that a clemency hearing had been set for September 16, 1994, then only ten days away. At the same time, Woodard was informed that he had a right to request a pre-hearing interview with the APA, which would be held three days later on September 9, 1994. Through newly appointed counsel, Woodard objected to the short notice. Woodard's counsel also requested the right to attend and participate in both the hearing and interview to assure that the conduct of the clemency proceedings did not prejudice Woodard's pending application for post-conviction relief.

When his request was not granted, Woodard brought suit under 42 U.S.C. §1983, challenging the constitutionality

of the APA's clemency procedures.[2] Those procedures are based, in part, on regulations adopted by Ohio's Department of Rehabilitation and Correction in July, 1994.[3] Among other things, the regulations provide that the APA must schedule a clemency review 45 days prior to any execution. An inmate is then barred from seeking a subsequent clemency hearing without leave of the APA. In this case, Woodard's execution was stayed by the Ohio Supreme Court within the 45 day period. As a result, the clemency review and the application for post-conviction relief were scheduled to proceed simultaneously. In addition, the regulations prohibit the presence of counsel at any pre-hearing interview conducted by the APA even when (as here) there is ongoing litigation, and even though the inmate's uncounseled statement can then be used against him at the clemency hearing. Finally, the APA's procedures bar the introduction of any documentary evidence or testimony at the clemency hearing other than whatever uncounseled statement the inmate may have given at his pre-hearing interview.[4]

Adopting the recommendation of the Magistrate Judge, the district court granted the APA's motion for judgment on the pleadings. The Sixth Circuit reversed on two grounds. First, it rejected the lower court's conclusion that the APA's procedures were immune from scrutiny under the Due Process Clause. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997). Second, it held that dismissal on the pleadings was improper because the APA's procedure

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[2] He also sought a temporary restraining order. Notwithstanding its earlier position to the contrary, the APA agreed to postpone the clemency proceedings indefinitely once the §1983 suit was filed.

[3] *See Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1195 (6th Cir. 1997)(Nelson, J., concurring in part and dissenting in part).

[4] *See* Complaint at ¶10.

may have burdened Woodard's Fifth Amendment privilege against self-incrimination by imposing an unconstitutional condition on his participation in an uncounseled clemency interview. *Id.* at 1189-91. The Sixth Circuit then remanded the case to the district court on both claims for the development of a factual record. Rather than return to the district court, the APA sought *certiorari*. Accordingly, the case comes before this Court only on the pleadings, and the allegations contained in those pleadings must be accepted as true. *See, e.g., Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

SUMMARY OF ARGUMENT

As a matter of law and tradition, the State of Ohio has long insisted that the governor's exercise of clemency must be preceded by a "thorough investigation." Since 1965, the responsibility for conducting that investigation has rested with the Ohio Adult Parole Authority.

The obligation to conduct a "thorough investigation" is a mandatory one under Ohio law. Especially in a death penalty context, this statutory entitlement is more than sufficient to trigger the protections of the Due Process Clause under this Court's well-established precedents. It also distinguishes this case from *Connecticut Bd. of Pardons v. Dumschaut*, 452 U.S. 458 (1981). In *Dumschaut*, this Court emphasized that the clemency decision remained a discretionary one. Here, Woodard's due process claim does not depend on a right to receive clemency. Instead, it turns on the state-guaranteed right to a "thorough investigation" and meaningful consideration of Woodard's clemency application.

The right to fair clemency procedures is also protected by principles of substantive due process. As this Court has noted, every state that authorizes capital punishment also

authorizes clemency. *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Clemency has historically been seen as a necessary fail safe in capital cases, and is plainly part of our nation's legal tradition. *Id.* The notion that the fail-safe function of clemency is irreconcilable with arbitrary procedures does not require an expansive view of substantive due process. Rather, it reflects fundamental principles of justice at the core of the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).[5]

ARGUMENT

I. OHIO'S LAW AND TRADITIONS HAVE CREATED A LIBERTY INTEREST IN FAIR CLEMENCY PROCEEDINGS THAT IS PROTECTED BY THE DUE PROCESS CLAUSE

As the Sixth Circuit correctly noted and as petitioner concedes, a Fourteenth Amendment liberty interest can be derived from either state law or the Due Process Clause itself. 107 F.3d at 1183. In this case, the Sixth Circuit properly found a protected liberty interest under the Due Process Clause given the integral role that clemency plays in Ohio's overall scheme of death penalty adjudication. *See* pp.16-17, *supra*.

The Sixth Circuit did not, however, accept Woodard's contention that state law also gives rise to a protected liberty interest in fair clemency procedures.[6] *Amici* respectfully

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[5] Although this brief addresses only the due process issues, *amici* support Woodard's contention that the APA's clemency procedures unconstitutionally burden his Fifth Amendment rights.

[6] This may be attributable to the fact that neither the Sixth Circuit nor the district court had the benefit of discovery or an evidentiary record concerning Ohio's executive clemency practices in capital cases.

submit that the Sixth Circuit's rejection of a state-created liberty interest was erroneous, and provides an alternative ground for upholding the judgment below.

Ohio's constitution, statutes, and decisions impose mandatory limits on the discretion of the APA and the governor to grant pardons and commutations without conducting a thorough investigation into whether clemency is appropriate. Thus, under Ohio law and tradition, Woodard had a legitimate expectation that he would be afforded a reasonable opportunity to apply for clemency before being executed and that the APA would conduct a mandatory, thorough investigation of his case.

In ruling that no state-created liberty interest existed, the Sixth Circuit gave short shrift to the body of law designed to further Ohio's interest in assuring that the power to grant clemency is not exercised in an arbitrary fashion. In fact, Ohio has recently reaffirmed that interest in two dramatic and revealing ways. First, the Ohio Supreme Court invalidated a pardon issued by the governor because it did not comply with state-mandated procedures. *See* pp.9-10, *supra*. Second, the citizens of Ohio amended the constitutional provisions governing clemency to reemphasize the importance of procedural regularity. *See* pp.6-7, *supra*.

A. Ohio Clemency Law And Tradition

The Ohio Constitution of 1802, art. II, §5, like the United States Constitution, granted the executive plenary power over clemency.[7] In 1852, however, the clemency provisions of Ohio's constitution were modified and the clemency power of the governor was made "subject" to

[7] The Ohio Constitution of 1802 provided that the governor "shall have the power to grant reprieves and pardon, after conviction, except in cases of impeachment."

"such regulations as to the manner of applying for pardons, as may be prescribed by law." OHIO CONST. art. III, §11 (1852).[8] The purpose of this revision was to provide the Ohio General Assembly with the authority to regulate the pardon application process by "establish[ing] prerequisites to the Governor's exercise of the power to grant pardons." *State ex rel. Maurer v. Sheward*, 644 N.E.2d at 374.

For nearly 150 years, Ohio's constitutional provisions governing clemency remained unchanged. During this century and a half, Ohio's governors regularly employed the clemency power to commute capital sentences. For example, between 1953 and 1963 when Ohio had its last execution, Ohio's governors reported to the General Assembly that they had commuted the death sentences of at least 13 convicted murderers to life imprisonment, while 25 others were executed. *See* BIENNIAL REPORTS OF THE OHIO PAR-

[8] Article III, §11 of the Ohio Constitution of 1852 provided in full:

> [The Governor] shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the General Assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor.

On November 7, 1995, this provision was amended by Ohio voters to force the governor to comply with regulations imposed by law as to the manner of applying for "commutations," as well as pardons. *Id.* (as amended Jan. 1, 1996).

DON AND PAROLE COMMISSION OF PARDONS, COMMUTATIONS, AND REPRIEVES (Biennial reports to General Assembly of cases in which Governors Lausche, Brown, O'Neill, DiSalle, and Rhodes granted clemency), *reprinted in* 126 OHIO SENATE JOURNAL 1542-47; 127 OHIO SENATE JOURNAL 1324-34; 128 OHIO SENATE JOURNAL 1470-75; 129 OHIO SENATE JOURNAL 1746-55; 130 OHIO SENATE JOURNAL 1809-16; 131 OHIO SENATE JOURNAL 1656-65.[9] In making these clemency decisions, Ohio's governors historically sought and relied on favorable recommendations from the Pardon and Parole Commission (predecessor of the APA). *E.g.*, Commutation of Lewis Niday (Nov. 23, 1959), reported in 129 OHIO SENATE JOURNAL 1747; Commutation of James Louis Long (Feb. 8, 1962), reported in 130 OHIO SENATE JOURNAL 1811.

Ohio reinstituted the death penalty in 1981, and the use of clemency in capital cases also resumed. By then, the Ohio legislature had codified the prior tradition of carefully investigating all clemency applications. Specifically, Ohio law has mandated since 1965 that the Adult Parole Authority must conduct "a thorough investigation into the propriety of granting" clemency in all cases and make a nonbinding recommendation to the governor.[10]

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[9] Absent the sort of discovery that Woodard sought in his lawsuit from the APA, it is difficult to ascertain the exact number of death sentences that have been remitted through clemency. The Biennial Reports sometimes omit information necessary to such a determination. However, every one of the referenced Biennial Reports recounts the commutation of one or more death sentences by the governor.

[10] Ohio Rev. Code §2967.07 provides (emphasis added):

> All applications for pardon, commutation of sentence, or reprieve *shall* be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the
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> (continued...)

Any ambiguity about the meaning of this provision was authoritatively resolved by the Ohio Supreme Court in *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, when it invalidated an executive pardon granted by the governor before the APA was given an opportunity to conduct a "thorough investigation" and make a recommendation. At the same time, the *Maurer* court ruled that the absence of a "thorough investigation" did not limit the governor's ability to commute sentences because the 1852 state constitution granted the legislature regulatory authority over pardons but not commutations. The fact that Ohio's constitution was subsequently amended to stipulate that commutations are also subject to the legislature's regulatory authority, *see* n.8, *supra*, only underscores the state's commitment to procedural regularity whenever clemency is at stake.

The holding in *Maurer* provides strong support for Woodard's assertion that he has a liberty interest under Ohio law in making an application for clemency and receiving a thorough investigation of his request by the APA, followed by a written report and recommendation to the governor. The *Maurer* court construed Ohio law as breaking the clemency power into "two distinct elements -- the application process and the consideration process." *Id.* at 378. The application process extends to the time "just before" the governor reaches a clemency decision and includes "the filing of the application itself, the investigation, the recommendation, and the full report by the APA." *Id.* Although the governor

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[10] (...continued)

> governor in any case, a thorough investigation into the propriety of granting a pardon, commutation, or reprieve *shall* be made by the authority, which *shall* report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor [sic] and the records or minutes relating to the case.

has the final say over whether to grant or deny clemency, there must first be compliance with the application element, "which *requires the APA to investigate, recommend, and report before the Governor may grant a pardon.*" *Id.* (emphasis added).

According to the *Maurer* court, this mandatory application element is "meant to ensure that information about each person for whom a pardon is considered will be available to the Governor, so that an informed decision may be made." *Id.* In *Maurer* itself, the Ohio Supreme Court concluded that because Governor Celeste had granted the pardon in question before the APA had completed its thorough investigation, report, and recommendation, "the pardon purportedly granted was invalid from the outset." *Id.* at 379.

The combined effect of *Maurer*, the revised clemency provisions to the Ohio Constitution, Ohio Rev. Code Ann. §2967.07, and Ohio's historical capital clemency practice is to create a uniquely bifurcated clemency system. *See In re Sapp*, 118 F.3d 460, 465-66 (6th Cir.), *cert. denied*, __, U.S. __, 117 S.Ct. 2536 (1997)(rejecting a due process challenge to Kentucky's clemency system because Kentucky, unlike Ohio, "has not made the clemency process part of the state's overall adjudicative process"). Clemency in Ohio is comprised of a decisionmaking element that is discretionary and unfettered, and an investigatory-recommendation element that gives rise to Woodard's liberty interest because it is unequivocally mandatory, and binds both the APA and the governor. According to the Ohio Supreme Court:

> The General Assembly has chosen the word "all" to indicate that every request for a pardon *must go to the APA for evaluation.* In addition, the General Assembly has chosen to use the word "shall" in R.C. 2967.07 three times in connection with the APA's role in the pardon application process. *This indicates the mandatory nature of the APA investigation and of the entire APA involvement in the APA investigation process.*

Maurer, 644 N.E.2d at 378 (emphasis added).

B. The APA's New Clemency Policy Deprives Woodard Not Merely Of Procedure For Its Own Sake, But Of Real And Substantial Interests In Seeking Clemency, In Having A Thorough Investigation Conducted In His Case, And In Having A Report And Recommendation Made To The Governor By The APA

The failure of the APA to conduct a meaningful investigation in death penalty cases denies Woodard, and all other death row inmates in Ohio, real and substantial rights guaranteed by state law and protected by the Fourteenth Amendment. By denying Woodward a genuine opportunity to participate in the process, the APA's clemency procedures effectively deprive Woodward of meaningful access to clemency. Considering the crucial role that clemency has played in Ohio's unique system of capital punishment, the importance of having an unimpeded opportunity to apply for clemency and to receive a thorough investigation by the APA cannot be overstated. This Court recognized as much when it observed that "[c]lemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. at 411-12. Surely an administrative policy that radically curtails access to Ohio's historic remedy in capital cases, and that limits the scope of the mandatory investigation into whether clemency is deserved, has taken away an essential interest created by state law.

The state argues that, notwithstanding Ohio's body of clemency law, Woodard does not have a constitutionally cognizable liberty interest because no "substantive limitations" have been placed on the governor's clemency power. Relying on *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, the state contends that unless Woodard can show that he has a right to receive clemency under certain circumstances, the Due Process Clause has nothing to say about how Ohio dispenses clemency.

If Woodard were predicating his Fourteenth Amendment interest on the likelihood of receiving clemency, then presumably *Dumschat* would be relevant. However, unlike the prisoners whose claims were rejected in *Dumschat*, Woodard plainly is not contending that he has a right to due process because he has a reasonable likelihood of receiving clemency under state law. Rather, he is arguing that due process is triggered because Ohio law imposes on the APA a mandatory obligation to consider his application for clemency, thoroughly investigate his case, and convey a recommendation to the governor. *Dumschat* never considered this question and its reasoning is not appropriately extended to this case for several reasons.

First, *Dumschat* dealt with an attempt to impose procedural restraints on the ultimate decisionmaker in Connecticut's clemency scheme, the Board of Pardons, which had absolute discretion both as to whether and how clemency was granted.[11] In determining that Connecticut law did not

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[11] The Connecticut statute in question provided:

> (a) Jurisdiction over the granting of, and the authority to grant, commutations of punishment or releases, conditioned or absolute, in the case of any person convicted of any offense against the state and commutations from the penalty of death (continued...)

create a protected liberty interest, this Court reasoned that the "commutation statute, having no definitions, no criteria, and no mandated 'shalls,' creates no . . . duty or constitutional entitlement." *Id.* at 466.

By contrast, Woodard does not challenge the "consideration" element carried out by the governor as ultimate decisionmaker, but the investigatory-recommendation element with which the APA is charged under Ohio law. *See State ex rel. Maurer v. Sheward*, 644 N.E.2d at 378. Unlike the Connecticut statute considered in *Dumschat*, Ohio's clemency statute repeatedly uses nondiscretionary language. *Maurer*, 644 N.E.2d at 378. In addition, the decision of the Ohio Supreme Court in *Maurer* employing judicial review to invalidate clemency decisions that are made without an APA investigation, report, and recommendation further suggests an intention to "cabin the discretion" of the clemency authorities. *See Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987). In that regard, Ohio's law is far more similar to the parole statute that gave rise to procedural protections in *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), than to the Connecticut commutation statute in *Dumschaut*. Thus, Woodard's claim that he is entitled to meaningful access to clemency and an investigation and recommendation by the APA is not "simply a unilateral hope," but is firmly rooted in the mandatory "statutes or other rules

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[11] (...continued)

> shall be vested in the board of pardons.
>
> (b) Said board shall have authority to grant pardons, conditioned or absolute, for any offense against the state at any time after the imposition and before or after the service of any sentence.

Conn. Gen. Stat. §18-26 (1981).

defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465.

Second, *Dumschat* dealt with the asserted liberty interests of prisoners who were merely seeking early release from serving noncapital sentences. *Id.* at 471 n.5. By contrast, Woodard is arguing that his death sentence should not be imposed at all. Because he is seeking to avert the imposition of capital punishment, Woodard has a qualitatively different interest in seeking clemency than the prisoners in *Dumschat*. *See Beck v. Alabama*, 447 U.S. 625 (1980)(holding that the Due Process Clause gives heightened procedural protections to capital defendants because of the greater need for reliability).

The state also argues that even if Ohio law does impose mandatory constraints on the APA, those requirements guarantee Woodard only "procedural" rights, not "substantive" rights. Relying primarily on *Olim v. Wakinekona*, 461 U.S. 238 (1983), the state contends that due process does not attach to what it describes as state-created "procedural" rights. *Olim*, however, held only that an administrative rule requiring a hearing prior to some prison transfers did not give the inmate a constitutionally protected "right" to a hearing that in turn triggered procedural protections. Justice Blackmun reasoned that if the decisionmaker can deny the requested relief for any constitutionally protected reason or for no reason at all, the state has not created a protected liberty interest. *Id.* at 249.

In the instant case the APA is not the final decisionmaker, only an advisory body charged with the mandatory task of conducting a "thorough investigation" of Woodard's clemency application and of making a report and recommendation to the governor. As the *Maurer* case established, the APA has no discretion in fulfilling these tasks, and thus stands in a different relation to Woodard than did the ad-

ministrator in *Olim* to that prisoner. The administrator in *Olim* had unfettered discretion to uphold the challenged prison transfer, which included presumably the ultimate say over the lesser decision of whether to convene a hearing to assist in making that decision. By contrast, the APA has no such discretion: its job is to investigate, report, and recommend, and it is this state-created expectation that gives rise to Woodard's Fourteenth Amendment interest. Contrary to the Sixth Circuit's view in this case, it is simply not true that the "only thing that counts is that there are 'no standards governing the [final decisionmaker's] exercise of his discretion.'" 107 F.3d at 1185, quoting *Olim v. Wakinekona*, 461 U.S. at 249-50.

Moreover, the state is simply wrong in contending that Ohio's statutory guarantees are "merely procedural" in the same sense that Hawaii's guarantee of a hearing prior to a discretionary transfer was procedural in *Olim*. As Justice Scalia has observed, "except at the extremes, the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988). Within the context of discerning a state-created liberty interest, the purpose of the substance-procedure dichotomy is to distinguish between rights that are truly significant to the individual and those that are relatively less important. *Sandin v. Conner*, 515 U.S. __, __, 115 S.Ct. 2293, 2300 (1995)(state-created liberty interests are generally limited to freedom from deprivations that impose "atypical and significant hardship" on the individual). Under any reasonable definition, Woodard's interest in receiving the fair clemency proceedings that Ohio has promised him is an interest of "real substance." *Id.* at 2297, quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

Ohio law mandates that the APA conduct a thorough in-

vestigation of Woodard's clemency petition, and that it report on that application and make a recommendation to the governor on whether to spare Woodard's life. Especially when viewed in light of Ohio's history of regularly commuting the sentences of many on death row, these guarantees represent a substantial benefit to Woodard that fall squarely on the "substance" side of the dichotomy. *See Del A. v. Roemer*, 777 F.Supp 1297, 1321 (E.D. La.1991)(state requirement of mandatory investigation of abuse charges is a substantive benefit which gives rise to interest protected by procedural due process for children who are the objects of abuse).

The APA's clemency procedures prevent Woodard from contributing information vital to the complex balancing of factors that is required of the clemency decisionmaker, obviously decreasing his chances of receiving clemency. The state's contention that it has taken nothing of importance away from Woodard is belied by Ohio's statutes and constitution, the rulings of the Ohio Supreme Court, and the integral role that clemency has historically played in Ohio's imposition of the death penalty.

II. OUR NATION'S HISTORY, LEGAL TRADITIONS, AND PRACTICES DEMONSTRATE THAT RESPONDENT HAS A SUBSTANTIVE DUE PROCESS RIGHT TO PURSUE CLEMENCY, ARISING FROM THE FOURTEENTH AMENDMENT ITSELF, WHICH MANDATES RUDIMENTARY FAIRNESS IN THE CLEMENCY PROCESS

The Sixth Circuit in *Woodard*, relying on *Evitts v. Lucey*, 469 U.S. 387 (1985), recognized a due process right arising directly from the Fourteenth Amendment based on the "integral role" of clemency in Ohio's system of justice.

Because *amici* agree with the reasoning of the Sixth Circuit on this point, we will not rehash that thoughtful opinion here.[12] Instead, *amici* urge the Court to consider an additional, compelling basis for finding that the APA's clemency procedures deprived Woodard of a liberty interest arising directly out of the Due Process Clause. The unwavering history, legal traditions, and practice of this country establish that capital defendants have a substantive due process right to have access to clemency, and to be given meaningful consideration of their application prior to execution. This right in turn triggers the procedural protections of the Fourteenth Amendment that were violated in Woodard's case.

Woodard's claim is that Ohio has effectively denied him access to clemency by: (1) creating a procedure that does not allow him to have counsel present at his interview (a right afforded by the majority of states that impose the death penalty, *see* Brief of Respondent and statutes cited therein); (2) prohibiting him from presenting evidence in

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[12] Under the reasoning of *Evitts*, Ohio is not free to rely on the clemency process as an important part of its procedure for choosing between the punishment of life or death, and then to conduct that process without regard to fundamental fairness. Once a state has chosen a constitutionally valid approach to capital punishment, "it must stick to the script." *Fetterly v. Paskett*, 15 F.3d 1472, 1483 (9th Cir.), *cert. denied*, 513 U.S. 914 (1994). The state seeks to evade the holding in *Evitts* by asserting that clemency, unlike the discretionary appeal that triggered due process in *Evitts*, is not part of the "system for finally adjudicating the guilt or innocence of the defendant" -- clemency exists "in spite" of the defendant's guilt or innocence. Petitioner's Brief at pp.20-21. However, such an attempt to portray clemency as being outside of the capital punishment process contradicts this Court's recognition in *Herrera* that clemency has long served as the remedy "*for claims of innocence based on new evidence*, discovered too late in the day to file a new trial motion." *Herrera*, 506 U.S. at 417 (emphasis added).

support of clemency (the vast majority of death penalty states permit the introduction of evidence by the applicant, *id.*); (3) forcing him to choose between pursuing clemency and continuing to contest his conviction in the courts; and (4) prohibiting him from reapplying for clemency without leave of the APA (no other capital punishment state prohibits death row inmates from applying for clemency, *id.*).

When considering the existence of a substantive due process right, this Court has instructed that we begin by "examining our Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, __ U.S. __, __, 117 S.Ct. 2258, 2262 (1997). Here, the teaching of history is clear -- clemency has always been considered an indispensable part of the death penalty process in this country.

Indeed, the broadly held view of clemency as an essential fail safe led the framers to include an explicit reference to clemency in the United States Constitution despite the notion of authorities like Blackstone, who believed that the pardoning power could not exist in democracies. 4 WILLIAM BLACKSTONE, COMMENTARIES *390 (asserting that the clemency power can never exist in democracies because in such a system, "nothing higher is acknowledged than the magistrate who administers the laws"). Alexander Hamilton, among others, argued that it was necessary to repose the clemency power in the president in the interests of "[h]umanity and good public policy." THE FEDERALIST No. 74, at 447 (A. Hamilton)(C. Rossiter, ed. 1961).

Throughout history, the states have also found clemency to be an essential part of their respective systems of justice. In *Herrera v. Collins*, 506 U.S. at 414, Chief Justice Rehnquist observed that clemency has been available in America since the founding of the British colonies and that today, every state that authorizes capital punishment has constitu-

tional or statutory provisions for clemency.[13] As the Court has noted, the most reliable indication of a national consensus regarding a practice is the pattern of enacted laws. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989).

This history, moreover, reflects more than tradition. Because criminal justice systems are inevitably fallible, clemency functions as a necessary fail safe intended to prevent the execution of the innocent. *Id.* at 415. The Court in *Herrera* noted that "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence." *Id.* Justices Stewart, Powell, and Stevens acknowledged this essential function of clemency when they observed that a criminal justice system which provided for capital punishment without also including access to clemency "would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. 123, 199 n.50 (1976) (Stewart, Powell, and Stevens, JJ.).[14]

Woodard's claim that before he may be executed he is entitled to have a realistic chance to apply for clemency and

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[13] In context, the statement in *Herrera* that the Constitution does not "require the States to enact a clemency mechanism," 506 U.S. at 414, appears merely to describe the scope of the presidential clemency provisions in Article II. The Court in *Herrera* did not engage in any substantive due process analysis or otherwise consider whether clemency was required in capital cases under the Fourteenth Amendment's Due Process Clause. Indeed, the exposition of clemency law included in *Herrera* leads to the opposite conclusion.

[14] The importance of clemency as a "fail safe," especially in capital cases, has become even more critical given recently enacted congressional restrictions on habeas corpus. *See, e.g., Felker v. Turpin*, 518 U.S. __, 116 S.Ct. 2333 (1996).

to be given meaningful consideration thus falls squarely within the protections accorded by the Fourteenth Amendment. The constitutional interest he asserts is protected by the substantive provisions of the Due Process Clause because it is derived from considerations deeply rooted in "reason," "the judicial process," and "the compelling traditions of the legal profession." *Rochin v. California*, 342 U.S. 165, 170-71 (1952). The notion that Ohio could impose capital punishment without providing a meaningful mechanism for clemency -- something that has never been done in our country's history -- surely violates "'principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko v. Connecticut*, 302 U.S. at 325, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). Yet, this is precisely what the state seeks to do by forcing Woodard to participate in a clemency process that is little more than a "meaningless ritual." *Douglas v. California*, 372 U.S. 353, 358 (1963)(due process requires more than simply allowing defendant to participate in meaningless ritual); *see also Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982)(fundamental liberty interest of natural parents in the care, custody, and management of child may not be terminated by state absent compliance with fair procedures).

This Court has stressed that it will exercise utmost care when considering whether to "'break new ground in [the] field' of substantive due process." *Albright v. Oliver*, 510 U.S. 266, 287 (1994)(Souter, J., concurring), quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). However, recognition of the right of death-sentenced individuals to have access to clemency and to receive meaningful consideration of their request is vital if clemency is to continue to fulfill its historical role as a fail safe in our system of capital justice. *Ford v. Wainwright*, 477 U.S. 399 (1986), in which the Court struck down Florida's procedures for pre-

venting the execution of insane individuals, is instructive of why Ohio's procedures for determining whether to remit the death sentence through clemency are constitutionally inadequate:

> In all other proceedings leading to the execution of an accused, we have said that the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976)(plurality opinion). And we have forbidden States to limit the capital defendant's submission of relevant evidence in mitigation of the sentence. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)(joint opinion). It would be odd were we now to abandon our insistence upon unfettered presentation of relevant information, before the final fact antecedent to execution has been found.
>
> Rather, consistent with the heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life, we believe that any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate.

Id. at 413-14.

By the same reasoning, a state's adoption of a capital clemency procedure that encourages arbitrariness is inconsistent with the heightened concerns for fairness and accuracy which have long characterized this Court's review of the capital punishment process. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(opinion of Stewart, Powell, and

Stevens, JJ.)(special concern for fairness and accuracy consequence of knowledge that capital punishment is uniquely irremediable). It would be anomalous to suppose that the state must be scrupulously fair in its procedures for finally determining whether a condemned prisoner is sane, but can nevertheless utilize a wholly capricious procedure when a capital prisoner seeks to avail himself of the "traditional remedy for claims of innocence based on new evidence." *Herrera v. Collins*, 506 U.S. at 417.[15]

[15] The need for judicial guidance in the setting of constitutional procedural standards for capital clemency is also apparent from troubling decisions arising in other jurisdictions. For example, in *Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997), the court ultimately upheld Arizona's capital clemency procedure whereby former attorneys for the inmate "switched sides" and prepared briefs, witnesses, and evidence on behalf of the state, opposing the prisoner's request for executive clemency. While terming Arizona's procedure "unfortunate and inexcusable," the court denied the inmate's due process claim, concluding that this clemency process did not "shock the conscience." *Id.* at 404. In *Otey v. Stenberg*, 34 F.3d 635, 639 (8th Cir. 1994), a panel of the Eighth Circuit, by a two-to-one vote, upheld Nebraska's capital clemency process whereby the deciding vote against commutation was cast by the Attorney General who had "acted as the chief prosecuting official in [the] case, and whose assistants represented the state at the clemency proceedings." One jurist was so disturbed by the serious questions about fundamental fairness in capital clemency proceedings raised by *Otey* and similar cases that he was moved to remark, "I am troubled by the state of the law in this field and look forward to possible changes." *Wainwright v. Brownlee*, 103 F.3d 708, 710 (8th Cir. 1997) (Henley, Senior C.J., concurring).

It is evident from these cases, and from Ohio's defense of its clemency procedure as immune from any federal constitutional scrutiny that, absent the promulgation of basic procedural standards by this Court, clemency can no longer be relied on to fulfill its historical role in state schemes of capital punishment.

As this Court has recognized, clemency is no longer an arbitrary act of mercy bestowed on the condemned by a beneficent executive. Justice Holmes, speaking of the president's clemency power, noted that "[a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927); *see also Roberts v. Louisiana*, 428 U.S. 325, 350 (1976)(White, J., dissenting)("The country's experience with the commutation power does not suggest that it is a senseless lottery, that it operates in an arbitrary or discriminatory manner"). The APA cannot arbitrarily prevent Woodard's access to this vital part of the constitutional scheme or deprive him of the thorough investigation and recommendation mandated by Ohio law.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Daniel T. Kobil
(Counsel of Record)
Capital University Law School
303 East Broad Street
Columbus, Ohio 43215
(614) 236-6675

Steven R. Shapiro
American Civil Liberties Union
125 Broad Street
New York, New York 10004
(212) 549-2500

Diann Y. Rust-Tierney
American Civil Liberties Union
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Joan M. Englund
ACLU of Ohio Foundation, Inc.
1266 West Sixth Street
Cleveland, Ohio 44113
(216) 781-6276

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IN THE
Supreme Court of the United States
October Term, 1997

OHIO ADULT PAROLE AUTHORITY, *et al.*,
Petitioners,

v.

EUGENE WOODARD,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Barbara E. Bergman
Co-Chair, NACDL *Amicus* Committee
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

Andrea D. Lyon
Counsel of Record
University of Michigan Law School
Michigan Clinical Law Program
363 Legal Research Bldg.
801 Monroe Street
Ann Arbor, MI 48109-1215
(313) 763-4319

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QUESTION PRESENTED

Whether, under U.S. Const. Amend. XIV, a person sentenced to death has an interest in "life" that triggers the protections of due process at the clemency stage of a capital proceeding?

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BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This *amicus curiae* brief is submitted in support of the position of the Respondent Eugene Woodard. Written consents of the parties to the filing of this brief have been contemporaneously submitted to the Clerk of the Court.[1/]

[1/] As required by Rule 37.6 of this Court, *amicus curiae* submits the following statement: no party authored this brief in whole or in part; and no person or entity, other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit organization whose membership is comprised of more than 9,000 lawyers and 28,000 affiliate members representing every state. Members serve in positions bringing them into daily contact with the criminal justice system in the state and federal courts. Members of the NACDL regularly represent defendants charged with capital offenses.

The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

SUMMARY OF ARGUMENT

1. The Fourteenth Amendment prohibits States from depriving persons of "life, liberty, or property without due process of law." Under the Due Process Clause, a capital defendant enjoys a protected interest in "life" until the moment of his death. Capital proceedings determine whether the State will deprive the defendant of that protected "life" interest. Thus, every part of capital proceedings must comply with the requirements of due process. When the State chooses to make the possibility of clemency available in the course of capital proceedings, it must do so in accordance with due process. *See Evitts v. Lucey*, 469 U.S. 387 (1985).

2. The difference in kind between "life" and "liberty" distinguishes this case from the prisoner cases--such as *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981)--on which petitioners rely. Those cases rest on the

premise that a convicted and incarcerated prisoner has forfeited all but a residuum of his "liberty." "Life" is different than "liberty." A capital defendant never surrenders his interest in "life" until his death. He retains that interest throughout the capital process, including the clemency stage.

ARGUMENT

I. A CAPITAL DEFENDANT HAS AN INTEREST IN "LIFE" THROUGHOUT THE CAPITAL PROCESS.

The Fourteenth Amendment guarantees that no State shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, cl. 1. A person's interest in "life" arises directly under the Due Process Clause itself; it is not a creature of state law. *See Screws v. United States*, 325 U.S. 91, 131 (1945) (Rutledge, J., concurring) (right to life "comprehends all others").

A capital defendant--like any other person--has a constitutionally protected interest in "life" until the moment of his death. That interest lasts throughout the capital process. It exists at trial, on appeal, and during habeas corpus proceedings. It exists even as the person enters the death chamber and is strapped to the gurney or the chair. It ends only with death.

This proposition appears to be so thoroughly accepted that the Court has repeatedly addressed capital defendants' post-conviction due process claims without questioning whether they had a protected "life" interest in the first place.

See, e.g., Murray v. Giarrantano, 492 U.S. 1 (1989); *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion).[2/] The Court even applied the Due Process Clause--without questioning the existence of a protected interest--to determine whether a second attempt at execution (after the first had failed) comported with the Constitution. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

Because a capital defendant has a constitutionally protected interest in "life" until the moment of his death, all facets of the process by which the State deprives him of that interest must comply with the requirements of due process. Although the States have some flexibility in determining what specific procedures they will provide before depriving a person of life, any such procedures must satisfy the Due Process Clause of the Fourteenth Amendment. "[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (direct appeal, although not constitutionally required, must comply with due process).

[2/] Petitioners insist that recognition of a protected interest in "life" at the clemency stage of capital proceedings will require wholesale revision of post-conviction death penalty practice, including a possible overruling of *Giarrantano*. Brief for Petitioners at 21-22. But petitioners' "floodgates" arguments confuse the threshold question of whether a capital defendant retains a protected interest at the clemency stage with the question of the process due. The nature of the process due to the defendant depends in part on the stage of the proceedings. Those protections reach their apex at trial and may diminish thereafter. Recognition that some process is due at the clemency stage will not require the Court to overrule or call into question *Giarrantano* or any other case concerning the protections due capital defendants.

Clemency proceedings form an integral part of the process by which States--including Ohio--administer the death penalty. "Today, all 36 States that authorize capital punishment have constitutional or statutory provisions for clemency," and "[e]xecutive clemency . . . provide[s] the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390, 414-15 (1993). As the Court noted in *Herrera*, clemency proceedings provide the principal means by which claims of "actual innocence" can be reviewed after conviction and direct appeal and before execution. *See id.* at 415-17.

Because the States have chosen to make clemency an integral part of the process by which they seek to deprive capital defendants of "life," clemency proceedings must "accord with the Due Process Clause." *Evitts*, 469 U.S. at 401; *see McGee v. Arizona State Board of Pardons and Paroles*, 92 Ariz. 317, 319-20, 376 P.2d 779, 781 (1962); Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U.L. Rev. 1507, 1531-39 (1995).

This case does not require the Court to determine what process is due a capital defendant at the clemency stage; the court of appeals left that issue to the district court in the first instance. *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1188, 1193-94 (6th Cir. 1997). It is important to note, however, that procedures designed to produce accurate factfinding can play a critical role in the clemency determination. The modern exercise of clemency is not the inherently mysterious "act of grace" that petitioners describe (Brief for Petitioners at 2-4, 22-24). *Cf. Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (Presidential pardon "in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme."). Recent empirical studies demonstrate that the decision to grant

clemency can turn on essentially factual determinations, such as the possibility that the defendant is actually innocent, the defendant's mental condition, and the relative culpability and punishment of the defendant and those with whom he participated in the crime. *See* Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289, 299-303 (1993). Procedural protections will enhance the accuracy of these determinations and thus ensure the effectiveness of the "fail safe" stage of the capital process.

II. THE "LIBERTY" CASES ON WHICH PETITIONERS RELY DO NOT CONTROL THIS "LIFE" CASE.

Petitioners' brief refers repeatedly to "life or liberty," as if those two interests were interchangeable for purposes of the Fourteenth Amendment Due Process Clause. *E.g.*, Brief for Petitioners at 9, 13, 16, 18, 20. Having obscured the critical distinction between "life" and "liberty," petitioners then rely on a series of "liberty" cases--particularly *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981)--to argue that respondent has no protected interest. But this case concerns "life," not "liberty." In light of the critical differences between these interests, *Dumschat* does not control here.

The Framers of the Fourteenth Amendment Due Process Clause--like their predecessors who drafted the same clause in the Fifth Amendment--established a hierarchy of protected interests. "Life" comes first, followed by "liberty" and "property." "Life" stands ahead of "liberty" for intuitively obvious reasons. Life is absolute; once taken, it is gone forever, and it cannot be taken or retained in part. Liberty is a matter of degree; liberty deprived can be restored, and liberty can be taken or retained by increments. A person's

interest in "life" exists undiminished until death. A person's interest in "liberty" can wax and wane over time.

This Court has repeatedly recognized the difference in kind between "life" and "liberty." In case after case, the Court and its members have distinguished between the death penalty--the deprivation of "life"--and sentences of imprisonment--the deprivation of "liberty." *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."); *id.* at 323 (Rehnquist, J., dissenting)(death is different because "it is irreversible; an executed defendant cannot be brought back to life," and because "it is indeed an ultimate penalty, which ends a human life rather than simply requiring that a living human being be confined for a given period of time in a penal institution").[3/] Although decided principally under the Eighth Amendment, the Court's death penalty decisions highlight the distinction

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[3/] *See also, e.g., California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Ford v. Wainwright*, 477 U.S. 399, 414 (1986) (plurality opinion) (referring to the "heightened concern for fairness and accuracy that has characterized our review of the process requisite to the taking of a human life"); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (constitutional difference between death and lesser punishments); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J.) (death profoundly different from all other penalties); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion) ("[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country."); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (Court recognized in *Furman* that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice").

that the Fourteenth Amendment draws between the interest in "life" and the interest in "liberty."

The "liberty" cases on which petitioners rely underscore this distinction. Those cases--all of which involve the rights of incarcerated prisoners sentenced to a term of imprisonment--rest on the premise that a person's "liberty" can vary; it can be taken in whole or in part and similarly restored. In *Wolff v. McDonnell*, 418 U.S. 539 (1974)--the first case in this line--the Court held that incarcerated prisoners retain an interest in liberty that the Fourteenth Amendment Due Process Clause protects. *See id.* at 556-57. The Court recognized, however, that prisoners' interest in liberty may be "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." *Id.* at 556.

The Court turned again to the nature of a prisoner's "liberty" interest in *Meachum v. Fano*, 427 U.S. 215 (1976), involving an intrastate transfer from one prison to another. The Court found that the transfer did not implicate the prisoner's residual interest in "liberty." It declared that, "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons." *Id.* at 224 (emphasis in original).

The Court further delineated a prisoner's "liberty" interest in *Greenholtz v. Inmates*, 442 U.S. 1 (1979), involving a challenge to Nebraska's method of determining suitability for parole. Distinguishing cases holding that parolees and probationers have a "liberty" interest in their conditional

freedom,[4/] the Court found a "crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty one desires." *Id.* at 9. Because the inmates were "confined and thus subject to all of the necessary restraints that inhere in a prison," the Court found that the Due Process Clause itself did not confer a "liberty" interest in the possibility of parole. *Id.* at 10-11. The Court concluded, however, that mandatory language in the Nebraska parole statutes created an "expectancy of release . . . entitled to some measure of constitutional protection." *Id.* at 12; *see also Hewitt v. Helms*, 459 U.S. 460, 468-72 (1983) (finding that mandatory directives in state administrative segregation regulations created protected "liberty" interest).

In *Vitek v. Jones*, 445 U.S. 480 (1980), involving a transfer from prison to a mental hospital, the Court again recognized that incarcerated prisoners retain a residuum of "liberty" under the Fourteenth Amendment Due Process Clause. Because transfer to a mental hospital was "not within the range of conditions of confinement to which a prison sentence subjects an individual," the transfer implicated that part of the prisoner's interest in "liberty" which had survived his conviction and incarceration. *See id.* at 493-94; *see also Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (involuntary administration of psychotropic drugs implicates prisoner's residual "liberty" interest).[5/]

[4/] *See Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

[5/] The Court's recent decision in *Sandin v. Conner*, 515 U.S. 472 (1995), reaffirms *Vitek*'s analysis of a prisoner's residual liberty interest under the Due Process Clause. *Sandin* appears to have abandoned the holding in *Greenholtz* and *Helms* that mandatory language in state regulations could give rise to a liberty interest beyond that provided by the Due Process Clause itself. *See id.* at 477-84.

Dumschat, on which petitioners principally rely, falls squarely within this line of "liberty" cases. The prisoner in that case repeatedly sought a commutation of his life sentence. The Connecticut Board of Pardons denied his applications without explanation. He sued, claiming (1) that the Board's action implicated a protected "liberty" interest, and (2) that due process required the Board to explain its denial of his applications. Relying on *Meachum* and *Greenholtz*, this Court found that the prisoner had no "liberty" interest at stake, because his conviction had "'constitutionally deprived [him] of his liberty.'" *Dumschat*, 452 U.S. at 464 (quoting *Greenholtz*, 442 U.S. at 7).

The analysis in *Dumschat* and the other prisoner "liberty" cases does not apply to deprivations of a person's interest in "life." The "liberty" cases turn on the fact that, through their convictions and the execution of their sentences of incarceration, the prisoners had *already lost* all but a residual interest in "liberty" for the duration of their sentences. The question in each case was whether the state procedure at issue implicated that residual interest.

"Life" is different. Conviction and incarceration may largely extinguish a prisoner's "liberty," but they cannot extinguish his "life" as long as he lives. A prisoner awaiting execution on death row may have lost all but a residual interest in "liberty," but he has not lost any part of his interest in "life." Thus, as he sits in prison today, Eugene Woodard has only the barest surviving interest in "liberty"; *Dumschat* makes that clear. But Woodard has the same, indivisible interest in "life" that he has always had, and he will retain that interest until the day he dies. Nothing in *Dumschat* or any of the other prisoner "liberty" cases on which petitioners rely is to the contrary. To the extent anything in the "liberty" cases has relevance here, it is the Court's distinction in *Greenholtz*

between "being deprived of a liberty one has . . . and being denied a conditional liberty one desires." 442 U.S. at 9. Ohio seeks to deprive Woodard of the life he "has," not some "conditional [life he] desires."

* * * *

In *Herrera*, this Court underscored the critical significance of the clemency stage in the capital process. The Court acknowledged that "our judicial system, like the human beings who administer it, is fallible"; it characterized clemency as the "fail safe" in that "fallible" system; and it noted that "the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." 506 U.S. at 415, 417; *see also Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (plurality opinion) (capital process without clemency would be "totally alien to our notions of criminal justice"). In light of the essential role clemency plays in the process by which capital defendants may be deprived of "life," States must conduct the clemency stage "in accord with the Due Process Clause." *Evitts*, 469 U.S. at 401.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ANDREA D. LYON
Counsel of Record
University of Michigan Law School
Michigan Clinical Law Program
363 Legal Research Bldg.
801 Monroe Street
Ann Arbor, MI 48109-1215
(313) 763-4319

BARBARA BERGMAN
Co-Chair, NACDL *Amicus* Committee
1117 Stanford N.E.
Albuquerque, NM 87131
(505) 277-3304

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

JEROME J. SHESTACK*
President
American Bar Association
RONALD J. TABAK
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

Counsel for Amicus Curiae

* *Counsel of Record*

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Bar Association ("ABA") submits this brief as *amicus curiae*[1] pursuant to Rule 37.3 of the Rules of the Supreme Court, to provide the Court its perspective

[1] Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

regarding one aspect of this case, *i.e.*, how the interrelated roles which postconviction and clemency counsel are expected to perform should influence the Court's determination of the appropriate due process test to apply.

The ABA[2] is a voluntary, national membership organization of the legal profession. Its more than 392,000 members, from each state, territory and the District of Columbia, include prosecutors, public defenders, private lawyers, trial and appellate judges from the state and federal courts, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields. Since its inception more than a century ago, the ABA has taken an active interest in promoting the availability of counsel as a crucial element in ensuring fundamental fairness in our adversary system of criminal justice.

The ABA has taken no position regarding the constitutionality of the death penalty. However, the ABA has been working to ensure that the death penalty is not imposed without the most careful consideration and full compliance with defendants' constitutional and legal rights. To this end, the ABA initiated in 1986 a Death Penalty Post-Conviction Representation Project. The project attempts, *inter alia*, to locate volunteer counsel to represent death row inmates in postconviction, federal habeas corpus and clemency proceedings, although the ABA has not adopted a policy regarding

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2 Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the necessity of clemency proceedings. Many ABA members have participated as counsel in clemency proceedings. Accordingly, the ABA believes it can provide the Court with some important perspectives regarding the role that counsel for a death row inmate is expected to play in a clemency proceeding -- perspectives that should assist the Court in determining the appropriate due process test to apply.

The ABA's involvement with this subject includes its proposal in 1979 "that the United States Supreme Court adopt a rule providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate postconviction or clemency petitions if necessary, in death penalty cases where the defendant cannot afford to hire counsel."[3] In 1989, the ABA adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. One of these Guidelines, 11.9.4, is entitled "Duties of Clemency Counsel" and is quoted at page 10 *infra*.[4]

SUMMARY OF ARGUMENT

Because Respondent already has postconviction counsel, the issue here is not whether counsel needs to be appointed. Rather, the issue that the ABA will address is the appropriate due process test to apply. It will do so by discussing the duties of postconviction and clemency counsel,

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3 Resolution 102B, approved by ABA House of Delegates at 1979 Midyear Meeting. Should the Court be interested, the ABA would be pleased to provide the Clerk of the Court with a copy of Resolution 102B and the other sources cited in this brief.

4 Resolution 122, approved by ABA House of Delegates at 1989 Midyear Meeting.

and the way in which the expectation of performance of those duties bears on due process.

As the court below recognized, "[t]he degree to which each component" of an overall adjudicative system "forms 'an integral part' of the overall adjudicative system determines the degree to which due process plays a role." *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178, 1186 (6th Cir. 1997) (citation omitted). This is so because "'the introduction of a second tier of adjudication unavoidably affects the operation and significance of the first tier.'" *Id., quoting United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 997 (1997).

Here, the State has created a state postconviction process in which counsel may actively represent a death row inmate, as Respondent's counsel is doing. The State also has created a clemency process, in which the State anticipates that counsel handling the postconviction proceeding will play some role. In this context, that which transpires prior to (or after) the clemency process is inevitably affected by the existence of that process, and *vice versa*. The ABA has a unique perspective regarding the clemency process and its interrelationship with the postconviction process because the ABA has studied and reviewed, and its House of Delegates has debated and approved, guidelines for clemency counsel which presuppose that the clemency process is interrelated with the postconviction process, as occurs in Ohio. Counsel should be expected to perform in accordance with these ABA guidelines, which recognize overlapping but different functions for counsel in the postconviction and clemency proceedings.

Under these circumstances, the due process considerations articulated in such cases as *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), should be applied. Applying a modicum of due process to the clemency process, as well as to other stages in capital

cases, will help ensure that counsel are permitted to play the important roles they are expected to play under the ABA's guidelines in every stage of the proceedings. That will enable clemency proceedings to perform the critical role stressed by the Court in *Herrera v. Collins*, 506 U.S. 390, 411-17 (1993).

Clemency hearings provide an opportunity for consideration, in a different context, of information presented at trial, but also for consideration for the first time of the merits of additional information about the death row inmate that was not offered at trial. Such information, even if originally presented in postconviction or federal habeas corpus proceedings without leading to relief therein, nevertheless can appropriately influence the clemency decision. In postconviction or habeas proceedings, such information is considered only in support of a constitutional claim, such as ineffective assistance of counsel, whereas in a clemency proceeding it can be considered in determining whether the death row inmate will be put to death.

One type of evidence that accordingly may be presented in a clemency proceeding without having been presented at trial is newly discovered evidence of the death row inmate's actual innocence of the crime. Similarly, a death row inmate seeking clemency may present important mitigating evidence that, although uncovered during postconviction proceedings, was presented therein solely with respect to trial counsel's performance, not for a determination of whether the inmate should be allowed to live. A third type of evidence that may be presented in a clemency proceeding without having been presented at trial is evidence that the inmate has adjusted to imprisonment and perhaps matured and behaved in an exemplary manner while on death row. Clemency counsel is uniquely able to investigate, develop and present all of these kinds of evidence in a thorough, accurate and reliable manner.

Counsel's participation at the clemency hearing also is vital in order to provide the death row inmate with a meaningful opportunity to respond to statements made at the hearing by the prosecutor, the judge, the victim's survivors, or other prosecution witnesses, all of whom Ohio's parole board may permit to appear at the hearing. For example, those opposing clemency may misstate important facts about the inmate's background. Counsel for the inmate, who typically has great familiarity with the trial record and postconviction investigation, is uniquely situated to provide accurate information in response. It is therefore imperative that clemency counsel be permitted to play an active role in the clemency proceeding.

ARGUMENT

I. THE INTEGRAL AND INTERRELATED ROLE PLAYED BY POSTCONVICTION AND CLEMENCY COUNSEL IS RELEVANT TO THIS COURT'S CHOICE OF THE APPROPRIATE DUE PROCESS TEST

Mr. Woodard has counsel for his postconviction proceeding, in which the Ohio courts will not preclude counsel from functioning in accordance with the ABA's guideline setting forth the duties of postconviction counsel.[5] His postconviction counsel wishes to represent him in the clemency proceeding as well, apparently without further appointment. Ohio's parole board evidently contemplates that Mr. Woodard's postconviction counsel will play *some* role in the clemency proceeding, because the parole board notified Mr. Woodard's postconviction counsel of the date of the clemency hearing. Thus, this case does not present an issue

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[5] American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3, at 27 (quoted *infra* at 19).

regarding Mr. Woodard's entitlement to have counsel appointed to represent him. Instead, Mr. Woodard's complaint alleges, in paragraphs 10-13, that his counsel would not be permitted to play a meaningful role in the clemency process because counsel would not have a reasonable amount of time to prepare an application for clemency and would not be entitled to be present at the clemency hearing or to present documentary evidence therein.[6]

Amicus believes that when the Court decides what due process analysis to apply to these allegations, the Court should take into account the expected role of counsel in clemency proceedings and postconviction proceedings. In this connection, Ohio's decision to establish a clemency process means that the availability of that process will inevitably affect, and be affected by, the availability of other processes. One of these processes is the state postconviction proceeding, in which Mr. Woodard is represented by the same counsel who also wish to actively participate on his behalf in the clemency proceeding. In part II, *infra*, *amicus* will discuss in detail the ABA guidelines which set forth what counsel is expected to do in representing a death row inmate in a clemency proceeding. At this juncture, *amicus* merely points out that these guidelines exist, and that they are related to other ABA guidelines that set forth counsel's duties in other stages of the proceedings that may end in an execution. The ABA, in adopting these guidelines, presupposed that these various proceedings, including clemency proceedings, would exist and believed that counsel should be permitted to play an active role in each of them. Accordingly, counsel represent-

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[6] The ABA recognizes that the Sixth Circuit had ordered the case remanded in order to achieve a better understanding of the specific facts about Ohio's procedures. In this brief, the ABA addresses, in the context of the facts as alleged in the complaint, basic principles regarding the functioning of counsel in any capital clemency proceeding.

ing Mr. Woodard in the state postconviction proceeding should expect to follow the ABA's guidelines in both the postconviction and the clemency proceedings.

Thus, the State's decision to have a clemency process, and its decision to have a postconviction process in which counsel are permitted to actively represent a death row inmate, are interrelated. Counsel's expectations of what counsel is expected to do in the postconviction proceeding inevitably is affected by knowledge of the existence of the clemency proceeding.

Under these circumstances, the existence of the clemency proceeding has constitutional implications, much as does the existence of the direct appeal. As this Court said in *Evitts v. Lucey*, 469 U.S. 387 (1985):

> [I]f a State has created appellate courts as "an integral part of the * * * system for finally adjudicating the guilt or innocence of a defendant", the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

Id. at 393 (*quoting Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). The court below aptly noted why this is so:

> * * * the enactment of an appellate system necessarily "alter[s] the balance between the layers of adjudication in a constitutionally significant manner". * * * That is, the introduction of a second tier of adjudication unavoidably affects the operation and significance of the first tier. For this reason, due process places constraints on an appeal even if it does not require an appeal in the first place. The appeal forms an "integral" and inextricable part of the procedures for determining whether a defendant should be deprived of his life, liberty, or property.

Woodard v. Ohio Adult Parole Authority, 107 F.3d 1178, 1186 (6th Cir. 1997), *quoting United States v. Smith*, 94 F.3d 204, 207 (6th Cir. 1996) (citation omitted), *cert. denied*, 117 S. Ct. 997 (1997).

Amicus agrees with the Sixth Circuit that these considerations also apply to clemency proceedings, albeit with somewhat less force than with regard to direct appeals. *See id.* at 1186-87. Certainly, the existence of clemency inevitably has ripple effects on the postconviction proceeding; and what counsel is expected to do in each proceeding is unavoidably affected by what counsel is expected to do in the other proceeding.

II. CLEMENCY COUNSEL HAS MANY ESSENTIAL DUTIES, WHICH ARE INTERRELATED WITH THE DUTIES OF POSTCONVICTION COUNSEL

A. Clemency Counsel Must Be Permitted To Perform Several Essential Duties

The ABA has considered carefully the functions that counsel for an inmate seeking clemency must perform. The ABA believes that clemency counsel should be expected to perform each of these functions, which are described below.

1. The ABA Has Specified What These Essential Duties Are

The ABA's Guideline 11.9.4 sets forth the following Duties of Clemency Counsel:

> A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.
>
> B. Clemency counsel should interview the client, and any prior attorneys if possible, and conduct an investigation to discover information relevant to the clemency procedure applicable in the jurisdiction.
>
> C. Clemency counsel should take appropriate steps to ensure that clemency is sought in as timely and persuasive a manner as possible.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, at 28.

The official Commentary to Guideline 11.9.4 elucidates this Guideline, as follows:

> * * * Counsel should be familiar with the governor or other clemency-dispenser, and with the factors the clemency-dispenser has historically found persuasive. If doubts about the fairness of the judicial proceedings that

> produced the death sentence have led to clemency in other cases, counsel should consider whether particular instances of procedural unfairness can be set out as to the client's case (requiring a familiarity with the legal history of the case). If personal characteristics of the condemned have proven helpful in past clemency proceedings, then counsel should mobilize an especially detailed investigation to discover and demonstrate examples of the client's similar characteristics to the extent possible.

Id. at 147 (footnotes omitted).

2. In Carrying Out These Duties, Clemency Counsel Must Consider What Has Been Persuasive In Other Cases

Since Ohio's current clemency-dispenser has as yet neither granted nor irreversibly denied clemency for a death row inmate, an Ohio attorney attempting to act in accordance with Guideline 11.9.4 should consider carefully all the factors that might lead to a grant of clemency.

Accordingly, counsel should be mindful of clemency's various functions, which go well beyond the functions of courts. This Court has recognized that clemency can be, and often has been, granted on grounds on which the courts cannot grant relief. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-17 (1993); *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976). As this Court recently stated, the clemency authority has the indispensable role of "preventing miscarriages of justice where judicial process has been exhausted." *Herrera*, 506 U.S. at 412 (footnote omitted). Thus, while evidence adjudged not to have been presented to the courts in

a timely manner may not provide a basis for judicial relief, even if it points towards a death row inmate's actual innocence, clemency is the "traditional remedy" for innocence claims based on newly discovered evidence. *Id.* at 416-17. Moreover, the clemency authority is free to grant relief when there are significant doubts regarding the death row inmate's guilt but not sufficient proof of actual innocence to satisfy the extremely high standards required for relief from courts. *See Carriger v. Stewart*, 95 F.3d 755, 761 (9th Cir. 1996) ("That the evidence against [the petitioner] is not overwhelming might well be considered * * * by the governor in exercising his power of executive clemency."). In addition, while the courts are not constitutionally required to determine if the penalty imposed in a particular capital case is disproportionate to the penalty imposed on a co-defendant or defendants in other capital cases, *see Pulley v. Harris*, 465 U.S. 37, 50-53 (1984), a clemency authority can grant clemency based on a desire to show that the State is providing even-handed justice. The clemency authority may also grant relief on the basis of mitigating factors that it finds persuasive, because clemency may be based on what Justice Cardozo described as "anything [that] is pertinent that may move the mind to doubt or the heart to charity." *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. 1918).

Each of the factors discussed above has led to clemency grants for death row inmates in other jurisdictions in recent years. An analysis published in 1993 shows that some of the reasons for grants of clemency to death row inmates in actual cases subsequent to *Furman v. Georgia*, 408 U.S. 238 (1972), have included: doubt about the death row inmate's guilt; the fact that equally culpable co-defendants received sentences less than death; mitigating factors, such as the inmate's mental problems; and the inmate's steps towards rehabilitation while on death row. *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289, 302-03 (1993).

3. Clemency Counsel Must Investigate And Submit Evidence That Should Have Been, But Was Not, Presented At Trial

In the cases summarized in the Radelet and Zsembik article, *supra*, clemency has been secured for other death row inmates on the basis not only of evidence presented at trial but also evidence that should have been introduced at trial, but was not. Accordingly, clemency counsel should investigate and consider offering evidence not contained in the trial record.

a. This Should Include Evidence Regarding Doubts As To Guilt, Comparative Culpability And Punishment, Remorse And Other Positive Actions While On Death Row

The additional evidence that clemency counsel should investigate and consider presenting should include evidence regarding guilt or innocence -- not only evidence that raises doubts about the inmate's guilt, but also that which sheds light on the degree of his criminal responsibility, and how it compares with that of others who did not receive the death sentence. It also should include evidence that while on death row, the inmate has exhibited remorse, has succeeded in becoming educated, or otherwise has made a positive adjustment to incarceration.

b. It Should Also Include Evidence Regarding Mitigating Factors Not Presented By Trial Counsel

Moreover, clemency counsel should investigate and consider presenting evidence of mitigating factors about

which the jury never heard. Such mitigating factors may include the following:

1. Medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);

2. Educational history (including achievement, performance and behavior, special educational needs including cognitive limitations and learning disabilities) and opportunity or lack thereof;

3. Military service, (including length and type of service, conduct, and special training);

4. Employment and training history (including skills and performance, and barriers to employability);

5. Family, and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religion influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct on supervision and in institutions, education or training, and clinical services);

6. Rehabilitative potential of the client.

7. Record of prior offenses (adult and juvenile), especially where there is no record, a short record, or a record of non-violent offenses.

8. Expert testimony concerning any of the above and the resulting impact on the client, relating to the offense and to the client's potential * * *.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.8.6, at 25-26.

Evidence regarding such factors may not have been presented at a death row inmate's trial because, as the ABA has recognized, trial counsel may be inexperienced, and even "[e]xperienced criminal counsel familiar with sentencing practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial." *Id.* at 96, Commentary to Guideline 11.4.1; *id.* at 134, Commentary to Guideline 11.8.6 (footnote omitted). Indeed, the ABA concluded that its need for a guideline specifically requiring counsel to investigate these mitigation factors was "underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation." *Id.* at 96, Commentary to Guideline 11.4.1.

Accordingly, counsel representing a death row inmate in a clemency proceeding should investigate each kind of mitigating evidence, unless that counsel already has undertaken that investigation during the postconviction and federal habeas processes -- in which event, the prior investigation need only be updated. Counsel should carefully consider pre-

senting in the clemency proceeding all mitigating evidence that might be persuasive to the clemency authority.

c. This Broad Range Of Evidence May Persuade The Clemency Authority Even If It Did Not Suffice To Secure Postconviction Or Habeas Corpus Relief

The kinds of evidence discussed in parts a and b above may be persuasive in a clemency proceeding even if they have not sufficed to secure relief in a postconviction or federal habeas corpus proceeding. Whereas "[t]he judicial system has a difficult time dealing with these new evidence claims," there is no such limitation on a clemency authority. The latter can consider all possibly relevant evidence, whether or not it was originally before the sentencing jury, and whether or not trial counsel waived any legal claims by failing to present it at trial. *See* Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. Rich. L. Rev. 227, 234-36 (1993).

Mitigation evidence that could have been, but was not, presented at trial provides a good example of information that may succeed in securing clemency even though it has not led to postconviction or habeas relief. Typically, when postconviction or habeas counsel provide evidence in mitigation that they assert should have been presented at trial, they do so in support of a claim of ineffective assistance of counsel. But under this Court's constitutional test for ineffectiveness, first enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984):

> The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. * * * Ineffectiveness is not measured against the standards set by good lawyers but by the average --"reasonableness under prevailing professional norms" * * *. Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by *effective* counsel, would receive at least the clemency of a life sentence.

Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) (citation to *Strickland* omitted) (emphasis in original). However, death row inmates such as those discussed in *Riles* might still receive "the clemency of a life sentence", *id.*, from the clemency authority even after losing their ineffectiveness claims in postconviction and habeas proceedings. "Indeed, clemency long predates sophisticated judicial sentencing procedures as a method for presenting mitigating information." *See* Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 Yale L.J. 889, 905 (1981) (footnotes omitted).

Similarly, evidence that the death row inmate is actually innocent may lead to clemency even though it does not lead to postconviction or federal habeas corpus relief. As the Court stated in *Herrera v. Collins*, 506 U.S. 390 (1993):

> Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of "actual innocence," not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits,

> even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

Id. at 416-17.

4. Clemency Counsel Must Also Consider Presenting, In A New Light, Evidence That Was Introduced At Trial

A clemency proceeding presents not only the opportunity to provide the clemency authority with "[i]nformation not presented earlier because of inadequate counsel, strategic considerations, or the unavailability of witnesses." It also provides an opportunity for the clemency authority "to reconsider information previously applied to the case only in a judicial setting," which may now "be seen in a new light because of differences in the screening mechanisms." *See* Deborah Leavy, Note, *supra*, 90 Yale L.J. at 893-94 n.17. Accordingly, counsel for a death row inmate seeking clemency should consider presenting, in this new context, information that was previously introduced at trial.

B. These Duties Of Clemency Counsel Are Interrelated With The Duties Of Postconviction Counsel

The duties of clemency counsel, discussed in part A, *supra*, are interrelated with the duties of postconviction counsel. The ABA's expectations of what postconviction counsel will do are set forth in the ABA's Guideline 11.9.3, which provides as follows:

> A. Postconviction counsel should be familiar with all state and federal postconviction remedies available to the client.
>
> B. Postconviction counsel should interview the client, and previous counsel if possible, about the case. Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Postconviction counsel should obtain and review a complete record of all court proceedings relevant to the case. With the consent of the client, postconviction counsel should obtain and review all prior counsel's file(s).
>
> C. Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues, including challenges to overly restrictive rules governing postconviction proceedings.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.9.3, at 27.

The interviews and investigation contemplated by part B of the ABA's Guideline 11.9.3 for postconviction counsel also are contemplated by Guideline 11.9.4 (quoted at page 10, *supra)* for clemency counsel. Where these steps already have been undertaken by postconviction counsel, they need only be updated by clemency counsel. Particularly where, as here, the same counsel representing the death row inmate in the clemency proceeding also has represented him in the

postconviction proceeding, little additional interviewing would be necessary for the clemency proceeding, provided that (unlike here) the postconviction work has already been completed.

A further interrelationship between postconviction counsel and clemency counsel is that the postconviction counsel should be fully cognizant of the procedural or other legal reasons that the inmate's claims were not successful in the postconviction proceeding. Where, as is often the case (see part A3c, *supra*), the claims failed in postconviction for reasons unrelated to their truth, it is vital that clemency counsel be prepared to bring this to the clemency-dispenser's attention so that clemency will not be denied based on a misimpression about the basis on which postconviction relief was denied.

Moreover, where postconviction counsel has not performed in accordance with the ABA's Guideline 11.9.3, this not only imposes additional investigatory duties upon clemency counsel. It also means that clemency counsel must be prepared to disabuse the clemency-dispenser of the notion that all the factual matters uncovered by the clemency counsel have already been carefully considered in the postconviction proceeding.

C. A State Representative Cannot Carry Out The Crucial Functions Of A Death Row Inmate's Counsel

As discussed in parts A3 and 4, *supra*, counsel for the death row inmate has a critical role to play in determining which previously presented information -- as well as which newly uncovered information -- might persuade the clemency authority to grant clemency, and in deciding which such information to actually present. This cannot be achieved by an investigator for the State, for the following reasons:

> When the state has responsibility for gathering information, institutional factors may prevent some information from being obtained. The applicant may not trust the state's investigator and may decline to reveal information that might otherwise be helpful to him. * * * Witnesses for the applicant may be intimidated by the state interviewer. * * * Moreover, the state investigator's role is distinct from that of an advocate for the applicant. * * *

Leavy, *supra,* 90 Yale L.J. at 900-01 n.61 (citations omitted). Not only is a State investigator far less likely than the death row inmate's counsel to ferret out evidence that could warrant clemency; but also, because of his institutional role, he cannot advocate on the inmate's behalf about the persuasiveness of that evidence.

Moreover, without the aid of counsel, the death row inmate "cannot correct or rebut information adverse to his application" presented by others. *Id.* at 901. The State, or even the victim's survivors, may, in opposing clemency, make misstatements about the death row inmate. When this occurs, it is crucial that counsel for the death row inmate have an opportunity during the clemency hearing to ensure that the clemency authority does not proceed on the basis of informational errors. *See id.* at 905.

III. A DUE PROCESS ANALYSIS BASED ON *EVITTS* AND SIMILAR CASES WILL BEST ENSURE THAT CLEMENCY COUNSEL WILL PLAY THEIR CRUCIAL ROLE

As shown in section I *supra*, it is important, in determining the appropriate due process analysis to apply here, to consider the roles that clemency and postconviction counsel are expected to play. In section II, *supra*, *amicus* has

discussed in detail the essential role which clemency counsel should be permitted to play, and has shown that this role is interrelated with the role that postconviction counsel is expected to play, and, indeed, with what counsel has done in every prior stage of the proceedings, beginning with the pretrial work of trial counsel. Under these circumstances, *amicus* believes the most appropriate due process analysis to apply is one that proceeds by analogy to *Evitts v. Lucey*, 469 U.S. 387 (1985), and other cases, such as *Morrissey v. Brewer*, 408 U.S. 471 (1972), which also deal with due process liberty interests that can be subject to judicial review. The due process principles applied in *Evitts* proceed from this Court's appreciation of the need to consider each and every "integral part of the * * * system for finally adjudicating" the defendant's fate. *See id.* at 393 (*quoting Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Here, as shown above, Ohio has chosen to make the clemency process an "integral part" of its adjudication of the fate of death row inmates, and the manner in which that process is carried out is interrelated with all the other adjudicatory proceedings.

As explained in depth in Respondent's brief, due process protections apply here because a defendant's interests in life and liberty require due process protections not only at the outset of criminal adjudicatory proceedings, but also until the conclusion of all adjudicatory proceedings intended to ensure that convictions and death sentences are reliable. The application of due process protections is particularly important in view of the critical nature of the clemency proceeding, as emphasized by the Court in *Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, the Court recognized that "[c]lemency * * * is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Id.* at 411-12 (footnotes omitted). Indeed, the Court stressed that clemency is the "'fail safe' in our criminal justice system." *Id.* at 415 (*quoting* Kathleen D. Moore, *Pardons, Justice, Mercy and the Public Interest* 131 (1989)). For that "fail safe" to operate, it must be conducted in accordance with at least the due process contemplated by such cases as *Evitts*, *Morrissey*

v. Brewer, 408 U.S. at 481 (due process "calls for such procedural protections as the particular situation demands"), and *Gagnon v. Scarpelli*, 411 U.S. 778, 781-91 (1973) (applying due process to probation revocation).

The due process right involved here is significantly different from that asserted in *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), a non-capital case. *Dumschat* concerned what occurred *following* the commutation proceeding, *i.e.*, whether the commutation decisionmaker was required, *after* making its decision, to explain its determination. *Dumschat* did not involve, as this case does, the clemency process itself and its integral connection to the other aspects of Ohio's adjudicatory system.

CONCLUSION

Because clemency is interrelated with other stages of the proceedings that determine whether a death row inmate will be put to death, the clemency proceeding should be conducted in accordance with the basic due process contemplated by such cases as *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Morrissey v. Brewer*, 408 U.S. 471 (1972). This will help enable clemency to serve the vital purpose that this Court recognized in *Herrera v. Collins*, 506 U.S. 390 (1993).

To accord with due process, it is crucial that the death row inmate's counsel be permitted to participate meaningfully in the clemency proceeding, including the hearing that Ohio's parole board conducts. Only such participation of counsel can ensure that the clemency authority will receive the broad range of evidence which it is empowered to consider and which may, indeed, persuade it to show mercy. Moreover, only counsel's participation can ensure that any contrary evidence will be considered in a complete and reliable manner.

Respectfully submitted,

JEROME J. SHESTACK*
President
American Bar Association
RONALD J. TABAK
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

Counsel for Amicus Curiae

**Counsel of Record*

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